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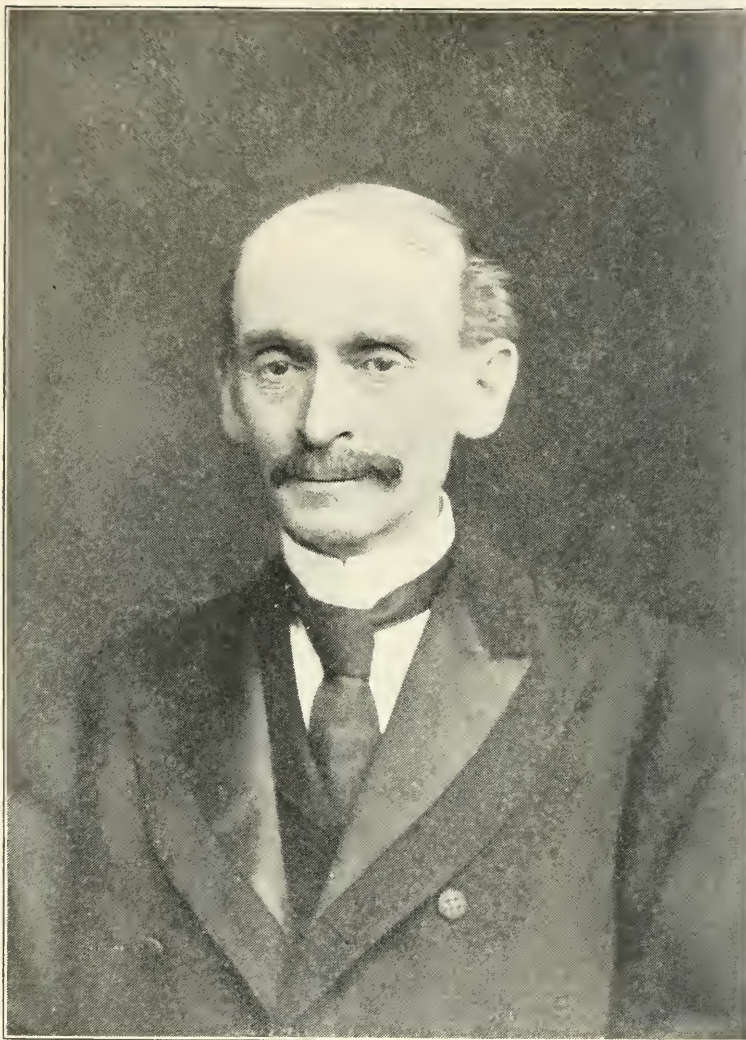
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W. R. DAY

CYCLOPEDIA OF LAW

THE ELEMENTS OF THE LAW OF Sales of Personal Property AND Equity or Chancery Jurisprudence

COMPRISING

The Principles of Law Governing all Contracts of Sale, Including the Formation of the Contract, The Effect of the Statute of Frauds, Conditions, Warranties, and the Rights of the Parties for a Breach of the Contract, including Stoppage *in Transitu*

ALSO

The History and Development of Chancery Law and Courts; The Principles of Jurisdiction; Maxims and Doctrines of Equity; The Grounds for Equitable Relief; Property in Equity, Including Trusts, Uses, Mortgage Liens and Assignments, and the Various Equitable Remedies, as Injunction, Specific Performance, Etc.

VOL. VIII

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PREFACE.

This volume is the eighth number of the twelve books contemplated to complete The Cyclopedia of Law. It is confidently expected that the remaining four volumes will be completed within a year from this date. We have no doubt but that all those interested in these publications will be glad to know that their publication is in the efficient hands of the American School of Law, and that the Series is being issued by this firm in a more durable and attractive dress than before.

While it may be unnecessary to state that there is no connection or inter-dependence between the subjects of Personal Property and Equity, and that their presentation together in this volume only results from the fact that to cover the various branches of jurisprudence in twelve volumes necessitates treating more than one subject in each volume, yet it would certainly be desirable if some of the equitable principles—which in theory are synonymous with justice—could be adopted and employed by those whose principal aim is the acquisition of property.

CHARLES E. CHADMAN.

Conneaut, Ohio, June 1st, 1905.

SALES OF PERSONAL PROPERTY.

CHAPTER I.

THE SUBJECT INTRODUCED AND DEFINED.

Sec. 1051.* SCOPE AND MEANING OF THE SUBJECT OF SALES.—Sales, or the law pertaining to the sale of personal property, is a part of the general law of contracts, which on account of the special rules applicable to this class of contracts and the scope and importance of the subject has long been treated by text-writers as a separate branch of law. Contracts of sale today form a very large part of all commercial transactions. In the early days of the common law, land, or real property, was of the greatest importance and personal property of little significance. Now all this is changed, and while landed property is still of importance the transactions concerning it are of far less significance than those dealing with personal property. Broadly speaking, everything is personal property that is not land, or real property.

Since it is not clear that the word "sale" is limited to chattels or personal property, and is not also applicable to transfers of real property, many writers

*This book is No. 8 of The Cyclopedia of Law, the former 1050 sections comprise the first seven books of the series.

use the expression "sales of personal property" to designate this branch of law instead of the mere word "sales." The books by Benjamin, Tiedeman, Mechem and others are thus entitled; those by Williams, Schouler and others are styled: "The Law of Personal Property;" while Story and others use the term: "Law of Sales," and the American and English Encyclopedia of Law, simply the term: "Sales." But whether designated as "Sales," "Personal Property," or more accurately, "Sales of Personal Property," it is now well understood that it is only the sale of chattel or personal property that is included within the subject.*

Sec. 1052. DEFINITION AND ESSENTIALS OF A SALE.—A sale is defined to be a contract by which is effected the transfer of the absolute or general property in a thing for a price in money.** This definition distinguishes a sale from exchange or barter, excluding all transfers effected by exchanging or bartering one commodity for another, and including

*See, 2 Bl. Com. 446; Benj. Sales, 1, 5.

**Benj. Sales, 1. "A sale is a contract for the transfer of property from one person to another, for a valuable consideration."—2 Kent Com. 625.

"Sale, or exchange, is a transmutation of property from one man to another, in consideration of some price or recompense in value." 2 Bl. Com. 446.

"Sale is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." Per Wayne J., 8 How. 495, 544.

only transfers for money. While this is strictly correct, the courts apply the same rules to both forms of transfers.*

Story's definition is: "A sale is the transfer of the absolute title to property for a certain agreed price." Schouler's definition is: "A sale is the transfer by mutual agreement of the absolute title to a certain property for a certain price."** Parsons' definition is: "A sale of a chattel is an exchange thereof for money." But this definition does not distinguish between exchange, which is a transfer of goods for goods and sale, which is a transfer for money.***

*Williamson v. Berry, 8 How. 544; Larabee v. Klostermann, 33 Neb. 167; Dowling v. McKenney, 124 Mass. 480; Redfield v. Tegg, 38 N. Y. 212. "If it be a commutation of goods for goods, it is more properly an exchange: but if it be a transferring of goods for money, it is called a sale." 2 Bl. Com. 446.

**Story, Sales, 1; Schouler, Per. Prop. 1.

***Exchange is said to be rather analogous to, than identical with sale. This distinction is not always observed by the courts, but that it exists is shown by the remedy: the declaration for breach of contract in an exchange must be special. Such a contract cannot be recovered on by what is known as the common counts for goods sold and delivered. So it is held that an averment in the declaration of sale will not be supported by proof of an exchange, nor will an averment of exchange be supported by proof of sale. (Vail v. Strong, 10 Vt. 465.) Thus, if A sells to B a horse for \$200, and B does not pay, A may sue B upon common counts, and is entitled to recover \$200. But if A has sold or exchanged to B the horse for a yoke of oxen, and B refuses to deliver the oxen, the damage to A is the value of the oxen. There is no money price fixed, it is an exchange of goods for goods and the declaration must be special. The value must be

On analyzing the definition of a sale as first given, four essential elements are discoverable; these are: 1. Parties competent to contract. 2. Mutual assent, or a meeting of the minds of the parties in agreement. 3. The thing sold or subject of sale, the title to which is transferred from one to the other. 4. The price paid or promised.

The first and second of these elements are common to all contracts, the third and fourth serve to distinguish the contract of sale from other similar contracts. Thus, Mr. Benjamin says, that the transfer of the absolute or general property in the thing sold, serves to distinguish sale from pledge, where the special property is in the pawnee and the general property in the pawnor, showing that there may be absolute or general property in one person and a special property in another. And the money paid or promised, for a cash or credit sale, distinguishes sale from barter or exchange.*

proved, and it is a question for the jury to determine the value of the oxen. (*Harris v. Fowle*, 1 H. Bl. 287; *Fuller v. Duren*, 36 Ala. 73.)

But where a statutory law forbids a sale, as in the case of the sale of intoxicating liquors, the better holding seems to be that an exchange of liquor for grain, or for work and labor, is a sale within the meaning of such a statute. (*Commonwealth v. Clark*, 14 Gray, 367; *Paschal v. State*, 84 Ga. 326.) J. Bigelow in the case first cited says that the distinction is one of shade rather than of substance, there being no essential difference in the rights of the parties; it in effect being the same as if the parties had placed an estimated value upon each article.

*Benj. Sales, 1, 2.

Sec. 1053. A SALE, OR BARGAIN AND SALE, DISTINGUISHED FROM CONTRACT OF SALE, OR EXECUTORY AGREEMENT.—“By the common law, all that was required to give validity to a sale of personal property, whatever may have been the amount or value, was the mutual assent of the parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was completely proven, and binding on both parties. If, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed in the common law ‘a bargain and sale of goods’; but if the property in the goods was to remain for the time being in the seller, and only to pass to the buyer at a future time, or on the accomplishment of certain conditions, as, for example, if it were necessary to weigh or measure what was sold out of the bulk belonging to the vendor, then the contract was called in the common law an executory agreement.”*

The common law “bargain and sale” meant a completed transaction, and this is the proper meaning of the word sale. It is also a contract as well as a com-

*Benj. Sales, 3. “A very important modification of the common law in respect to bargain and sale of goods, and to executory contract, was introduced by the statute 29 Car. II. c. 3, commonly called the Statute of Frauds, and amendment thereof, the 9 Geo. IV. c. 14, s. 7, known as Lord Tenterden’s Act.” (Id. 4.) A separate chapter is given to these acts in this book. See Chapter IV. post.

pleted transaction, title having fully passed to the vendee; while the agreement to sell, or executory agreement, uncompleted, is an executory contract of sale, to be completed in the future, and no present title passes to the vendee. The distinction between executed contracts of sale, or sales proper, and executory contracts of sale or agreements to sell is important as it occasions most of the difficulty that arises out of the transactions relative to the transfer of the title to personal property. In a sale or executed contract of sale, the title then and there passes from the seller or vendor to the purchaser or vendee; while in an executory contract of sale the title does not pass, but remains in the vendor. And, strictly speaking, if the title does not pass there is no sale.*

Sec. 1054. A SALE DISTINGUISHED FROM OTHER TRANSACTIONS.—A sale is also to be distinguished from bailment, from bailment with right

*It is said that the word sale is used by the profession in legal controversies as meaning an actual transfer. And if in connection with the word sale the word contract is used, it is then an executed contract of sale, or a completed sale that is meant. But it is evident that these meanings are not always to be given to the words, but that they are frequently used by the profession and especially by non-professional persons when nothing more is meant than executory contract of sale, and one in which the title does not pass, and which in law is a mere agreement to sell.

In this treatise the word sale will be used to designate an actual completed sale, while an agreement to sell uncompleted, will be designated as executory agreement or contract of sale. A separate chapter will be given to explain the distinction between executed and executory contracts of sale. Sec, Post, Chapter V.

to purchase, from pledge, from chattel mortgage, from lease or hiring, from assignment, from consignment, from gift, from exchange or barter, from agency, and from a contract for labor and materials. In some exceptional cases the facts concerning a contract approach so closely to two or more of the above transactions that it is necessary to lay down certain tests which will serve to distinguish one from the other.

1. Bailment. In a sale we have seen the title passes. In a bailment only a special or qualified interest passes to the bailee. The established test between a bailment and a sale is, that when the identical thing delivered is to be returned, though perhaps in an altered form, it is a bailment, and the title is not changed; but when there is no obligation to return the specific article received, and the receiver is at liberty to return another thing, either in the same or some other form, or else to pay money, he becomes a purchaser, the title is changed, and the transaction is a sale.*

2. Bailment With Right to Purchase. When the contract gives the receiver of the goods the option of purchase or return, or where they are delivered on trial, this contract constitutes a bailment only until the option has been exercised by the purchaser or receiver. If a time is set in which the goods are to

*Ewing v. French, 1 Blackf. (Ind. 1825) 354; Randell's Case, 3 P. C. Rep. 101 (1869); Bretz v. Diehl, 117 Pa. St. 589; Bastress v. Chickering, 18 Ill. App. 198; Sattler v. Hallock, 160 N. Y. 291; 73 Am. St. Rep. 686.

be returned, on a contract of sale or return, and the goods are not returned within this time, the transaction becomes an absolute sale. So the detention and use of an article beyond a reasonable time, when no time is set for the return, is considered an election to make the sale complete and perfect.*

3. Pledge, Chattel Mortgage, Lease. Defining a sale as the transfer of the *absolute* or *general* property in a thing, distinguishes it from a pledge or loan, from a chattel mortgage, from a lease or hiring and from bailment, as in each of these there is only a transfer of a special interest while the general property remains in the pledgor, mortgagor, etc. In the case of a mortgage though the general title passes to the mortgagee, it is conditional and reverts to the mortgagor instantly upon the performance of the condition without any act of reconveyance.**

4. Assignment, Consignment. The term assign-

*Hunt v. Wyman, 100 Mass. 198; Dando v. Foulds, 105 Pa. St. 74; Moss v. Sweet, 16 Q. B. 493; Quinn v. Stout, 31 Mo. 160; 24 Am. & Eng. Encyc. L. 1024. There is a distinction between a delivery with an option to purchase if one likes, and a purchase with an option of return if one does not like; in the former case the title does not pass until the option is exercised, in the other it passes instantly, subject to a right to return and rescind. Wilson v. Stratton, 47 Me. 120; Kahn v. Klabunde, 50 Wis. 235; Strauss Saddlery Co. v. Kingman, 42 Mo. App. 216; Houck v. Linn, 48 Neb. 227.

**Halliday v. Holgate, L. R. 3 Exch. 299; Smith v. Niles, 20 Vt. 315; Merrifield v. Baker, 9 Allen, 29; Susman v. Whyard, 149 N. Y. 127; Ware v. Hooper, 98 Fed. Rep. 160. See the subject of Conditional sales, Post Chap vi.

ment being used in the general sense of a transfer of property would include a sale, but is usually used in a more limited sense as the making over by the owner to another of the whole of his property, real or personal, for certain purposes described in the instrument making the assignment.*

As a rule, where goods are "consigned" for sale, that is, to be sold for the benefit of the consignor, the contract is a bailment, and not a sale to the consignee; the goods do not become his property, or liable to attachment by his creditors.** But where the consignee is to sell upon terms fixed by himself, and is bound to pay the consignor a fixed price, when the goods are sold, the contract is one of sale.***

5. Gift, Barter. A sale is a transfer for a price in money, a gift is a transfer without consideration. Exchange or barter has already been distinguished from sale, the one being founded on a money consideration, the other on property other than money. There is no substantial difference between a sale and an exchange or barter, except in the common law forms of pleading.

6. Agency, Contract for Labor and Materials.

*Ball v. Chadwick, 46 Ill. 31; Johnson v. McGrew, 11 Ia. 151; Hight v. Sachett, 34 N. Y. 451.

**Meldrum v. Snow, 9 Pick. 441; Walker v. Butterwick, 105 Mass. 237; Weir Plow Co. v. Porter, 82 Mo. 23; Holleman v. Fertilizer Co., 106 Ga. 156; Bank v. McAndrews, 5 Mont. 325.

***Wood Machine Co. v. Brooke, 2 Sawy. (U. S.) 576; Nutter v. Wheeler, 2 Lowell (U. S.) 346; Halliday v. Hamilton, 11 Wall. (U. S.) 560.

The contract respecting goods may be so framed as to make the receiver of them an agent of the owner in respect to the transaction or the purchaser. The intention of the parties as legally determined will control the nature of the contract, and, generally, the main test is whether or not an option is given the receiver of the goods to pay for and keep them; in case this is done it is a sale, and title passes absolutely, so that in case of the goods being destroyed it falls on the transferee, or receiver.*

It was formerly held that where goods bargained for did not exist in *solido* at the time, and were to be manufactured or completed, it was a contract for work and labor and not of sale.** This rule is now modified, and only articles specially manufactured to fill an order are considered as contracts for work and labor, while an order for articles regularly manufactured, is a sale though the articles are not in existence at the time.***

*Fleet v. Hertz, 98 Ill. App. 564; Columbus Etc., Co. v. Crane 9 U. S. App. 46; Black v. Webb, 20, Ohio, 304, 55 Am. Dec. 456. In the last case B gave to W a writing setting forth that B had received \$175 as an advance to buy barley for W, and B agreed to deliver at a certain place and within a certain time and for a named price one thousand bushels of barley, was held, a sale and not an agency, and the barley being injured by flood before delivery the loss fell on B, the property being at his risk until delivery, Ruthrauff v. Hagenbuch, 58 Pa. St. 103.

**Parsons v. Loucks, 47 N. Y.; Crookshank v. Burrell, 18 Johns. (N. Y.) 58 9 Am. Dec. 187.

***Shawhan v. Van Nest, 25 Ohio St., 490; Finney v. Appgar, 31 N. J. L. 266; Donnell v. Hearn, 12 Daly, 230.

Sec. 1055. AUTHORITIES ON THE LAW OF SALES.—Among the many valuable text-books and authorities on the law of Sales, or Personal property, we mention the following: Benjamin's Sales, is an English treatise by J. P. Benjamin, which has reached its 7th American edition, and is a very exhaustive work. Blackburn and Williams are English authors of books that are quoted and used in the United States, the latter work having reached its 4th American edition. W. W. Story's work on "The Law of Sales," is the pioneer among American authorities. Among later American authors may be mentioned, Baker, Barbour, Darlington, Dwight, Schouler, Tiedman, Usher and Mechem. The works by Prof. Schouler and Prof. Mechem are in two volumes. The article on "Sales" in the 24th volume of the second edition of the American and English Encyclopedia of Law, is most complete and valuable in that the cases cited are the latest, and are gathered from the reports of all the states.

It may be well to mention here that in England, following the plan of simplifying and codifying the common and statute law on special branches of law, as Negotiable Instruments, in 1893, the Sale of Goods Act was passed, making uniform and codifying the principles of law relating to Sales. The English act was drafted by Judge M. D. Chalmers, and he reproduced as exactly as possible the existing law on the subject. This act is given at length in the 7th Am. Ed. of Benjamin on Sales. It is to be hoped that the same plan will be followed in the various States.

CHAPTER II.

CONCERNING THE PARTIES AND MUTUAL ASSENT.

Sec. 1056. OF THE PARTIES TO THE CONTRACT—IN GENERAL.—The general rules of law which determine and fix the capacity of parties to make contracts, and which protect them from liability by reason of infancy, coverture, and the like causes, are applicable in determining the capacity of parties to the contract of sale. These principles have already been considered under the subject of Contracts in a previous number of this Series, and need not be given again.* The special principles applicable to sales are given in the following sections.

Sec. 1057. SAME SUBJECT.—WHO MAY SELL.—No one can sell goods and convey a valid title to them unless he is the owner, or the legal representative of the owner, the maxim being, *Nemo, dat quod non habet*. That is, the purchaser of goods, however innocent he may be, can derive no title nor property in goods bought from one not the owner, as is the case where lost or stolen goods have been sold to some innocent purchaser. The original owner of the goods may maintain trover or replevin against any one having the possession of them.**

*Home Law School Series, No. 4, Secs. 452-457.

**Smith v. Clews, 114 N. Y. 190; Peer v. Humphrey, 2 A. & E. 495; Stone v. Marsh, 6 B. & C. 551.

There are a few special cases which present exceptions to the rule above stated, these are:

1. Market Overt. In England from a very early day it was the custom to hold a public market on special days in certain towns, and goods sold in such places at such times were exempt from the general principles above stated and the purchaser took a good title although the seller was not the lawful owner of them.* The English law as to sales in Market Overt has never obtained sanction in America, and no sale, however public, of stolen goods will pass title to the purchaser.**

2. Negotiable Instruments. All forms of negotiable instruments come under the well settled rule of the Law Merchant by which they commonly pass on delivery, before maturity, from man to man, like coin, so that even a thief may pass a valid title to such paper, if the buyer for value has been guilty of no fraud in taking them. This subject has already been fully treated in No. 6 of the Home Law School Series.

*5 Rep. 83b; 2 Bl. Com. 450; Benj. Sales, Secs. 6-14.

**Towne v. Collins, 14 Mass. 500 (1785); Roland v. Gundy, 5 Ohio, 202; Bryant v. Whitчер, 52 N. H. 158; Jones v. Nellis, 41 Ill. 482.

The public sale of goods on execution by a sheriff was at one time thought to resemble sale in Market Overt under the English law, and to pass a good title to the buyer, even though they did not belong to the execution debtor, but it is now well settled that such a sale passes no better title than was in the execution debtor. (Bryant v. Whitчер, 52 N. H. 158; Black v. Jones, 64 N. C. 318; Griffith v. Fowler, 18 Vt. 390.)

(*Wheeler v. Guild*, 20 Pick. 545; *Seybel v. Bank*, 54 N. Y. 288; *Spooner v. Holmes*, 102 Mass. 53.)

3. Pledgees. The pledgee or pawnee of property, although not the owner has such an interest in the same that, after a default, he may sell the same without judicial process and pass a good title to the purchaser. Good faith and due notice are, however, always requisite. (See the subject of Bailments in No. 5 Home Law School Series; *Stearns v. Marsh*, 4 Denio, 227; *Washburn v. Pond*, 2 Allen, 474; *Schouler*, Bailments, Secs. 229-230.)

4. Masters of Vessels. The Master of a vessel has the right to sell the ship and cargo, in case of actual necessity only, the circumstances then being held to create an implied agency. (*Post v. Jones*, 19 How. 150; *The Amelia*, 6 Wall. 26; *Myers v. Baymore*, 10 Pa. St. 114.)

5. Factors. By the Factors' Acts in the different States it is customarily provided that a factor, consignee, or other agent intrusted with the possession by the owner for the purpose of sale, is deemed to be the true owner of the goods so far as to give validity to sales. To do so he must be really and truly such factor or agent, must have the actual possession or documentary evidence of title, and he cannot pledge such goods nor transfer the same in payment of his own pre-existing debt. (*Thatcher v. Moors*, 134 Mass. 156; *Bank v. Shaw*, 61 N. Y. 299; *Howland v. Woodruff*, 60 N. Y. 73; *Wright v. Solomon*, 19 Cal. 64; *Warner v. Martin*, 11 How. 209.)

6. Goods Not in Possession. The real owner of

personal property may make a valid sale of the same although they are in the adverse possession of another; the buyer may bring suit in his own name to recover possession, the doctrine of disseisin not applying to personal property. This is true though the goods are under attachment issued against the owner, such transfer passing title subject to the creditor's lien. (Webber v. Davis, 44 Me. 147; McKee v. Judd, 12 N. Y. 622; Bank v. Thomas, 125 Mass. 278; Klinck v. Kelley, 63 Barb. 622.)

7. Other Cases. Both at common law and by statute goods of a perishable nature, the title of which is in litigation may be ordered sold by the court on application, and even goods not of a perishable nature may be ordered sold at once if there is any just or sufficient reason therefor. (The Hercules, 11 P. D. 10; Benj. Sales, Sec. 18; See Secs. 3229, 5544, 5636, 6009, Rev. Stat. Ohio.) So at common law the title of a *bona fide* purchaser for value of property from one who was intrusted with the possession and apparent ownership by the true owner, will be upheld, because such acts on the part of the owner implies the grant of the power of alienation to the party in possession. (Dias v. Chickering, 64 Md. 348; Nixon v. Brown, 57 N. H. 34; Gunn v. Davis, 78 Pa. St. 15; McMahon v. Sloan, 12 Pa. St. 229.) By Statute in Ohio it is provided that where personal chattels remain for five years in the possession of a person to whom a pretended loan has been made they will be deemed the property of such person, unless a written instrument reserving the title in the lender is taken

and recorded within six months after such loan is made. (Sec. 4197, Rev. Stat. Ohio.)

Sec. 1058. SAME SUBJECT.—WHO MAY BUY.—“There are certain classes of persons incompetent to contract in general, but who under special circumstances may make valid purchases. Infants, insane persons, and married women are usually protected from liability on contracts, as also drunkards when in such a state as to be unable to understand what they are doing; such persons being considered to be devoid of that freedom of will, combined with that degree of reason and judgment, that can alone enable them to give the *assent* which is necessary to constitute a valid engagement.” (Benj. Sales, Sec. 21.) These exceptions will now be briefly considered.

1. Infants. These are persons under the age of majority. Such persons may buy, and acquire as good a title as an adult; but their legal liability for purchases is very different, being protected by law from liability except for necessities. For these the infant may be sued, the amount recovered being the reasonable value of the goods sold.* In such a suit against an infant two questions arise: (a) Were the articles sold within the class of things called necessities, for which an infant can be liable under any circumstances. (b) Were the specific articles sued for actually neces-

*Earle v. Reed, 10 Met. 387; Gregory v. Lee, 64 Conn. 413; Walter v. Everard (1891), 2 Q. B. 369. Also see Home Law School Series, No. 3, Secs. 378-380.

sary for the infant in the particular case. The first question is for the court, the second for the jury*

An infant's sales may also be avoided as well as his purchases, even during minority. And property so sold may be reclaimed wherever it is found, some cases holding that it may be taken from the hands of an innocent purchaser from the infant's vendee.** In such cases, however, it becomes the duty of the infant to return, if possible, the consideration received in the sale. The student is referred to Vol. 3 of the Home Law School Series in which the subject of Infancy is more fully treated.

2. Lunatics, and Others Mentally Incompetent. Persons mentally unsound, whether permanently or temporarily so, are protected like infants from being bound on contracts except for necessities. Their contracts are voidable only, not void. The person contracting with them is always bound, and this is so though the contract be wholly executory.***

*Mohney v. Evans, 51 Pa. St. 80; Bent v. Manning, 10 Vt. 225; Barnes v. Barnes, 50 Conn. 572.

**Chapin v. Shaffer, 49 N. Y. 407; Shipman v. Horton, 17 Conn. 481; Towle v. Dresser, 73 Me. 252.

***Allen v. Berryhill, 27 Ia. 540; Sawyer v. Lufkin, 56 Me. 308; In re Rhodes, 44 Ch. D. 94; Kendall v. May, 10 Allen, 59. In Hallet v. Oakes, 1 Cush. 296, it is held that Counsel fees for services rendered in good faith to test the question of insanity are considered to be a necessity; and the better opinion seems to be that such persons will be liable for goods furnished and valuable services rendered in good faith, and without reason to suspect insanity, before the question of sanity has been judicially determined, and the other parties can not be put in *statu quo*. (Young v. Stearns, 48 N. H.

3. Married Women. At the common law the contracts of married women except in a few cases, were held absolutely void, and could not afterwards be ratified by her so as to be binding.* But the modern statutes have abrogated the common law and so enlarged their capacity to contract and assume liability that the common law holdings are seldom applicable. This subject has been previously discussed in No. 3 of the Home Law School Series, to which the student is referred.**

Sec. 1059. MUTUAL ASSENT.—HOW EXPRESSED.—“The assent of the parties to a sale need not be express. It may be implied from the language, or from their conduct; may be signified by a nod or gesture, or may even be inferred from silence in certain cases; as, if a customer takes up wares off a tradesman’s counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods.”***

133; *Insurance Co. v. Hunt*, 14 Hun. 169, 79 N. Y. 541; *Bank v. Moore*, 78 Pa. St. 407; *Fay v. Burdett*, 81 Ind. 433.) That a sale made by one too intoxicated to understand the nature of the transaction may be avoided, see *Barret v. Buxton*, 2 Ark. 167, the leading case in America on this subject; *French v. French*, 8 Ohio, 214; *Carpenter v. Rodgers*, 61 Mich. 384.

**Watkins v. Halstead*, 2 Sandf. 311; *Musick v. Dodson*, 76 Mass. 624; *Hayward v. Barker*, 52 Vt. 429; *Benj. Sales*, Secs. 31-34.

**Home Law School Series, No. 3, Secs. 378-380.

****Benj. Sales*, Sec. 38.

In order to constitute a valid contract, the assent must also be *mutual* or *reciprocal*, and intended to bind both sides. It must also be concurrent in point of time. Intent to sell is always necessary on one side, and intent to buy on the other. If these intents do not exist mutually, at the same time, there is no contract of sale. Therefore where there is no intention that the title shall be transferred in reality, but only a colorable sale, no title passes.*

The necessity for co-existence of assent allows an

*Commonwealth v. Simonds, 90 Mass. 59. In Hutchinson v. Bowker, the defendant wrote and offered to sell a cargo of *good* barley, the plaintiff answered and said he would take it, but he expected *fine* barley and *full* weight. The defendant replied that no such expression was used in his letter, and he refused to ship the barley. In the trial it was shown that the term, *fine* barley, and *good* barley were distinct and well known in the trade, and *fine* barley the heaviest. The court held that the minds of the parties did not meet since *fine* barley was a better quality than *good* barley, 5 M. and W. 535.

A proposal or offer must in some way be accepted to constitute a sale. For this reason the bidder at auction may retract before the property is "struck off" to him. Fisher v. Seltzer, 23 Pa. St. 308. Where the fair import of the defendant's correspondence or acts is that he assents to the plaintiff's proposal, and from which the plaintiff believes, and has reason to believe, that he assents, his secret intention not to assent is immaterial. Bohn Mfg. Co. v. Sawyer, 169 Mass. 477. The question is, was there really an acceptance? Thus where plaintiff offered to buy shoes upon certain specified terms, the defendants replied that plaintiff's letter "should have prompt attention." Held, no acceptance. Manier v. Appling, 112 Ala. 663. See also, Smith v. Gowdy, 8 Allen, 566; State v. Peters, 91 Me. 31; McDonald v. Bewick, 51 Mich. 79; Wilson v. Wilson, L. R. 5 H. L. 64.

offer to be retracted at any time before acceptance, though time is given in which to accept. Thus where G. offered to exchange horses with E. and pay \$50 difference. E. reserved the right of deciding within two or three days. They actually exchanged to enable E. to decide; but before the time was out or any decision made by E., G. gave E. notice that he withdrew his offer. Held no bargain, and that E. could not recover the \$50 of G.*

So, as assent may be given and the bargain closed at any time before retraction though the period allowed for such acceptance has not expired. The proposer not having withdrawn his offer cannot object that the other did not require all the allotted time.**

The assent must also be communicated to the proposer, either actually or in legal contemplation, as by mailing a letter of acceptance.*** The acceptance must be made known to the other party *within the time* fixed by his offer. Where no time is stated, the

*Eskridge v. Glover, 5 Stew. and Port. 264; Larmon v. Jordan, 56 Ill. 204; Thompson Mfg. Co. v. Perkins, 97 Ia. 607.

**Cooper v. Lansing Wheel Co., 94 Mich. 272.

Where A offers for a certain price, and B offers to accept at a less price it is a rejection by B of the offer by A. But if B merely makes an inquiry of A as to whether he will not modify the terms of the sale or sell at a less price, this will not give A the right to consider the offer as rejected, and a subsequent acceptance before the offer is withdrawn, will bind both parties. Stevenson v. McLean, 5 Q. B. 346.

***Beckwith v. Cheever, 27 N. H. 41; Emerson v. Graff, 29 Pa. St. 358; White v. Corlies, 46 N. Y. 467.

acceptance must be within a reasonable time.* The acceptance or assent must also be unconditional. That is, it must exactly conform to the offer, neither more nor less; at least must not change any material condition.** So the retraction of the offer must be made known to the offeree before it has any effect. Otherwise, if the acceptance be duly signified or mailed by the offeree, before any knowledge of a retraction, though one had been really sent, the sale is completed.***

**Oil Co. v. Lead Co.*, 4 Dill. 431; *Averil v. Hedge*, 12 Conn. 424; *Longworth v. Mitchell*, 26 O. St. 334. What is reasonable time is a question of law for the court. *Craft v. Isham*, 13 Conn. 41.

***Potts v. Whitehead*, 23 N. J. Eq. 514; *Decker v. Gwinn*, 95 Ga. 518. Thus a person need not accept a less quantity than ordered, nor a larger quantity. *Bruce v. Pierson*, 3 Johns, 534; *Rommell v. Wingate*, 103 Mass. 327. But a slight excess of the amount ordered would not excuse one from receiving and paying for the true amount in the absence of any fraud. *Jenness v. Iron Co.*, 53 Me. 20; *Seed Co. v. Hall*, 14 Kans. 553; *Shrimpton v. Warmack*, 72 Miss. 208. In *Horne v. Niver*, 168 Mass. 4, it was held, that an offer asking a reply by telegraph, could not be accepted by sending a letter by mail two days later. And an offer to sell 100 kegs of butter at 20 cents is not accepted by reply, "Will take your butter at 20 cents if good."—*McIntosh v. Brill*, 20 Up. Can. C. P. 426. Such modified acceptance closes the negotiations, and no subsequent acceptance of the original offer is effective. *Cartmel v. Newton*, 79 Ind. 1; *Baker v. Holt*, 56 Wis. 100. Otherwise, a mere inquiry in regard to the offer.—*Stevenson v. McLean*, 5 Q. B. D. 346.

****The Palo Alto*, *Davies*, 344, 2 *Ware*, 344; *Wheat v. Cross*, 31 Md. 99; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Cooke v. Oxley*, 3 T. R. 653; *Taylor v. The Merchants' Fire Ins. Co.*, 9 How. 390; *Brauer v. Shaw*, 168 Mass. 198.

Sec. 1060.—SAME SUBJECT.—SALES CONTRACTED BY MAIL AND BY TELEGRAPH.—

The rule with reference to acceptances is that the party making the offer by letter can not reject after a letter of acceptance has been duly mailed by the offeree. And this is true, some cases hold, even if the letter of acceptance never reaches the other party.* It seems that when an offer is sent by mail, it implies a request or authority to return the acceptance in the same way, thus in a manner making the mail the agent of the party sending the proposal. If the offeree desires to make his liability depend upon the actual receipt of the acceptance, he may do so by so stipulating.**

The same courts that hold that a contract by letter is closed by mailing the acceptance, also hold that an acceptance by telegraph is completed when deposited at the office of the Telegraph Company.***

*Mactier v. Frith, 6 Wend. 103 (1830); Vassar v. Camp, 11 N. Y. 441 (1854); Bryant v. Booze, 55 Ga. 438 (1875); Haas v. Myers, 111 Ill. 421 (1885); Howard v. Daly, 61 N. Y. 362.

**Lewis v. Browning, 130 Mass. 173; Atlee v. Bartholomew, 69 Wis. 43; Bank v. Miller, 106 N. C. 347.

***Trevor v. Wood, 36 N. Y. 307; Utley v. Donaldson, 94 U. S. 29; Perry v. Iron Co., 15 R. I. 380.

It has also been held that a party who sends an order by telegraph makes the Company his agent for its transmission and delivery, and that he is bound by the message delivered, and that the receiver is entitled to put the message in evidence, as the original message, Loveland v. Green, 41 Wis. 431. This holding should be taken with some qualification since, if a mistake is made, probably the sender would have a right of action against the company.

Where the acceptance is made by letter or by telegraph it is sometimes a question as to where the contract is made. The rule is, that it is made in the state where it is assented to. This is the American doctrine.*

If the contract is valid by the laws of the state where assented to, it will be enforced in the state where the letter is sent, although it would be invalid if made in that state.**

In case the person who makes the offer dies or becomes insane before the offer is accepted, the offer is revoked.***

Sec. 1061.—SAME SUBJECT.—IMPLIED CONTRACT.—A contract of sale will be implied under certain circumstances without any expression of the will or intention of the parties; an example of this is, where an express contract has been made, and a part of the goods is sent, accepted, and retained after or with knowledge that the whole will not be furnished, here an implied contract arises to pay *pro rata*, subject in some courts to a counter claim for damages for non-completion.**** Some American cases have ap-

*French v. Mansfield, 97 Mass. 89; Garbract v. Commonwealth, 96 Pa. St. 449.

**Knight v. Mann, 120 Mass. 219; Rindkoph v. DeRuyter, 39 Mich. 1; Grimes v. VanWetchten, 20 Mich. 410; Stone v. Browning, 168 N. Y. 598. This is the Canadian law also but is not followed in England.

***Pratt v. Society of Elgin, 93 Ill. 475; Brown v. McDonald, 129 Mass. 66; Scruggs v. Alexander, 72 Mo. 134.

****Oxendale v. Wetherell, 9 B. & C. 386; Hart v. Miller.

parently declined to apply this rule, although the peculiar language of the contracts in some of these decisions may also have had some effect upon the conclusions reached.* In New York it is held, by later cases, that if the vendee accepts part, then knowing that the whole will not be delivered, he thereby waives full performance and becomes liable for the part accepted, at the contract price, less damages resulting from failure to deliver the balance.** So where goods are sent to one without having been ordered, and he receives and consumes them knowing that the sender expects him to pay for them, an implied sale arises.***

And where a party induces a vendor to sell goods to an insolvent person by misrepresentation and then obtains the goods for his own benefit, it is held that the vendor may recover on an implied contract of sale against the person in possession of the goods.****

Another special case in which a sale takes place by

15 M. & W. 85; *Richards v. Shaw*, 67 Ill. 222; *Bowker v. Hoyt*, 18 Pick. 558; *Saunders v. Short*, 86 Fed. R. 225.

**Witherow v. Witherow*, 16 Ohio, 238; *Champlin v. Rowley*, 13 Wend. 258; *Kein v. Tupper*, 52 N. Y. 555; *Tipton v. Feitner*, 20 N. Y. 423.

***Avery v. Willson*, 81 N. Y. 341; *Silberman v. Fretz*, 12 App. Div. (N. Y.) 328; *Brady v. Cassidy*, 145 N. Y. 171; *Churchill v. Holton*, 38 Minn. 519.

****Wellauer v. Fellows*, 14 Wis. 105.

*****Hill v. Perrot*, 3 Taunt. 274; *Corking v. Jarrard*, 1 Camp. 37; *Benj. Sales. Sec. 48*. In *Hill v. Perrot*, *supra*, the court said that the defendant could not set up the sale, because his own fraud had procured it, and the mere possession, unaccounted for, raised an *assumpsit* to pay.

the operation of certain principles of law, rather than by the mutual assent of the parties, either expressed or implied is, where a judgment in trover or conversion for goods, is followed by payment, then the plaintiff's title is transferred to the defendant. The acceptance of the value being an implied assent to a change in the ownership.* The general rule is that an unsatisfied judgment in trover does not pass title in the property to the defendant.** Some cases hold that the title passes upon the mere recovery of the judgment in trover without any satisfaction of such judgment.***

Where property is taken wrongfully, by a tort, and converted to the use of the wrongdoer, many courts hold that the owner may waive the tort, and recover its value upon an implied assumpsit.**** Other courts hold that it is necessary that the property wrongfully taken should be converted into money by the wrongdoer, before assumpsit could be maintained. In this case the owner may recover for money had and received to his use and benefit by the defendant.*****

*Chinery v. Viall, 5 H. & N. 288; 29 L. J. Ex. 180; Hepburn v. Sewell, 5 H. & J. 211; Brady v. Whitney, 24 Mich. 154; Thayer v. Manley, 73 N. J. 309.

**Brinsmead v. Harron, L. R. 6 C. P. 584; Miller v. Hyde, 161 Mass. 472; Terry v. Munger, 121 N. Y. 165.

***Floyd v. Brown, 1 Rawle, 121; Marsh v. Pier, 4 Rawle, 287. Miller v. Hyde, 161 Mass. 472, gives the decisions holding both ways on this question.

****Terry v. Munger, 121 N. Y. 165.

*****Watson v. Stover, 25 Mich. 386; Tolan v. Hodgeboon, 38 Mich. 624; Jones v. Hoar, 5 Pick. 285.

Sec. 1062.—SAME SUBJECT.—MISTAKE ANNULS ASSENT.—“From the general principle that contracts can only be effected by mutual assent, it follows that where, through some mistake of fact, each was assenting to a different contract, there is no real valid agreement, notwithstanding the apparent mutual assent.*

In *Wood v. Boynton* (64 Wis. 265) it was held, that in the absence of fraud or a mistake as to the identity of a thing sold the vendor can not rescind the sale and maintain an action of replevin. And that where the value of the thing sold was open to the investigation of both parties, and both supposed at the time that the price paid was a fair one, no disparity, however great, between such price, and the real value, is to be received in an action at law as evidence of fraud.**

In *Sherwood v. Walker*, (66 Mich. 568), the Su-

*Benj. Sales, Sec. 50.

**The case of *Wood v. Boynton*, *supra*, is an exceptional one and not now followed in America. The facts in this case were that a poor woman in Milwaukee sold to a jeweler a stone which she was informed and believed to be a topaz. The stone in fact was an uncut diamond and worth from \$700 to \$1,000. She tendered back the dollar paid her with interest thereon and demanded the return of the stone. In an action brought by her to recover the diamond it was held that there could be no ground for rescision by the vendor unless; 1. the vendee was guilty of some fraud in procuring a sale to be made to him; or 2. that there was a mistake made by the vendor in delivering the article sold. That is, a mistake in fact of the identity of the thing delivered. The court saying that since both parties were ignorant of its true value and supposing the sum offered a fair price, the sale could not be rescinded.

preme court of Michigan added as a third reason for rescinding a sale, the vendor's misapprehension as to the substance of the thing bargained and sold. Saying, that if the thing actually delivered is different in substance from the thing bargained for and intended to be sold, then it is no sale.*

By the weight of authority the mistake of fact for which a contract may be rescinded, on the ground that the assent of the parties did not really exist as to the same subject-matter of sale, may be either, as to

*In this case a cow was contracted to be sold on the belief that she was barren and useless for breeding purposes; later it appeared that such was not the case, this was held to be such a mistake as to the substance of the thing bargained for as to allow the sale to be rescinded. The court said that a party who has given an apparent consent to a contract of sale may refuse to execute it, or may avoid it after it has been completed, if the consent was founded, or the contract made upon the mistake of a material fact—such as the subject matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. Where, in such a case, the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, there is no contract; but if it be only a difference in some quality, or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, the contract remains binding.

the thing sold;* as to the quantity;** as to the price.***

But while some mistakes avoid a sale, a mistake as to the quality, quantity, or fitness for some intended but unexpressed purpose will not usually have that effect, thus a mistake as to the solvency of a maker of a note which is being sold in market is a mistake as to the *quality* and does not avoid the sale.****

It is said that the test in every case is to determine whether the mistake or misapprehension is as to the

*Thus where the sale was of ten tons of sound merchantable hemp, and the vendor intended to sell St. Petersburg hemp, and the buyer to purchase Riga Rhine hemp, a better article, the mistake having been made by the broker in describing the hemp to the buyer, it was held that no contract existed between the parties.—Thornton v. Kempster, 5 Taunt. 786; Sheldon v. Capron, 3 R. I. 171; Rupley v. Daggett, 74 Ill. 351.

**Roffles v. Wichelhaus, 2 H. & C. 906; Henkel v. Pape, L. R. 6 Ex. 7.

***Where a person not understanding the English language intended to bid 48 guineas for an article at auction and his bid was taken as one for 88 guineas, it was left to the jury to say whether the mistake had actually been made, as a test of the existence of the contract of sale.—Phillips v. Bistolli, 2 B. & C. 511; Chapman v. Cole, 12 Gray, 141. It is also held, on the ground of mistake, that a sale of a piece of furniture with valuables in a concealed drawer does not pass title to such unknown and really unsold articles. Bowen v. Sullivan, 62 Ind. 281; Hogue v. Mackey, 44 Kans. 277; Livermore v. White, 74 Me. 452; Huthmacher v. Harris, 38 Pa. St. 491.

****Hecht v. Batcheller, 147 Mass. 355, disapproving Harris v. Bank, 15 Fed. Rep. 785; Sample v. Bridgeforth, 72 Miss. 293; Stoddard v. Ham, 129 Mass. 383; Smith v. Ware, 13 Johns, 257; Williams v. Hathaway, 19 Pick. 387.

substance of the whole contract, going as it were to the entire matter, or only to some point, although a material point, an error which does not affect the whole consideration. Thus in *Kennedy v. Panama Mail Co.*, (2 Q. B. 579), it was said that in order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent misrepresentation as to any part of that which induced him to enter into the contract. But where there has only been an innocent misrepresentation, it is no ground for a rescision, unless it was such as that there is a complete difference in the substance between the thing bargained for and obtained, so as to constitute a failure of consideration. *Wood v. Boynton*, (64 Wis. 265), is the only case holding that persons who sell property in mistake of fact may not rescind the contract and recover the property.*

Sales, may also be void for uncertainty, or because the parties have expressed themselves in language so vague and unintelligible that the court finds it impossible to fix a definite meaning to their language. In such cases the contract will be held ineffectual.**

*That a sale founded upon a material mistake of fact as to the person dealt with, or as to the existence, identity, species, or kind of subject-matter, or the price, is not binding, see *Mudge v. Oliver*, 1 Allen, 74; *Harris v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 9 Allen, 492; *Gibson v. Pelkie*, 37 Mich. 380; *Kyle v. Cavanagh*, 103 Mass. 356; *Meyer v. Richards*, 163 U. S. 385; *McGorren v. Avery*, 37 Mich. 120. Also see the subject of Mistake as treated in the subject of contracts, Number 4 of the Home Law School Series.

**Thus in *Guthing v. Lynn*, (2 B. & Ad. 232), where a suit was brought upon alleged warranty on the sale of a

An agreement will not be deemed unintelligible where there is a mere error, omission or mistake in drawing it up, if the real nature of the mistake can be shown so as to make the bargain intelligible. Thus a court may allow the word "dollar," or "pounds" to be added to a note or bond where such was the plain intention of the parties; and correct an obvious mistake without hesitancy.*

It is held that a mistake as to the *person* with whom the contract is made may or may not avoid the sale according to the circumstances. The whole question turns upon the want of assent. It is a general principle that every man has the right to elect with whom he will deal or contract. Every man has the right to the benefit and contemplation of the character and credit of every person with whom he contracts. In the case of a trader who sells for cash, it can make no

horse, and it was alleged that the price of the sale was for 63 pounds, and the proof showed the sale to be given for sixty guineas, and "if the horse was lucky to the plaintiff he was to give five pounds more, or the buying of another horse." This last clause as to the horse being "lucky" was stricken out by the court as unintelligible, and the plaintiff allowed the recovery for the remainder. See also *Whelan v. Sullivan*, 102 Mass. 204; *Cumner v. Butts*, 40 Mich. 322, in the last case a contract stipulated that either party might cancel the same on sixty days' notice "for good cause"; this was held to be so uncertain that any revocation in good faith would be sufficient. *Marble v. Standard Oil Co.*, 169 Mass. 553; *Buckmaster v. Consumers' Ice Co.*, 5 Daly, 313.

**Coles v. Hulme*, 8 B. & C. 568; *Willson v. Willson*, 5 H. L. C. 40; *Burchell v. Clark*, 2 C. P. D. 88. See also, *Lloyd v. Lord Say and Seale*, 10 Mod. 46; *Landon v. Goole*, 3 Lev. 21

possible difference whether the buyer be Smith or Jones, and a mistake of identity would not effect the contract. But where the sale is on credit, and the solvency of the buyer is one of the important elements of the sale, the identity of the person contracted with is of such importance that a mistake will avoid the contract. So where the purchaser intends to deal with one against whom he would have the right to set off the price, a mistake as to the person dealt with will prevent the contract from coming into existence for want of assent.*

Where a person undertakes to manufacture an article, or deliver goods which he guarantees shall be satisfactory to the buyer, he thereby makes the purchaser the sole judge whether the article is satisfactory or not, and there is no remedy left to the seller for a refusal of the buyer to accept such articles.**

*Benj. Sales, Sec. 58; *Mitchell v. Lepage*, Holt N. P. 252; *Boulton v. Jones*, 2 H. & N. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9; *Consumers Ice Company v. Webster*, 32 App. Div. (N. Y.) 592. In *Boston Ice Co. v. Potter* the court treated as immaterial the question whether the purchaser had or had not a right of set-off against the plaintiff, and held that a mere mistake as to the party contracted with will be sufficient to defeat an action for the price of goods so purchased and consumed. It appears to us that the American cases have gone too far upon this question of the identity of the person contracted with, and that they have not the force and justice of the English decision of *Boulton v. Jones*, *supra*. See *Robsen v. Drummond*, 2 B. & A. 303.

***Silsby Mfg. Co. v. Town of Chico*, 24 Fed. Rep. 893; *McClure v. Briggs*, 58 Vt. 82; *Gibson v. Cranage*, 39 Mich. 49. In the last case an artist agreed that the portrait would be satisfactory to the purchaser, and it was held that however

It makes a great difference whether the articles furnished the purchaser are guaranteed to be satisfactory to him, or whether they are merely to be such as in legal effect ought to be satisfactory. Where they are to be satisfactory to the purchaser at all events, he is not obliged to take them unless they are so, while in the other case if the vendor has complied with the directions the purchaser must accept. In New York it is held that that which the law will say the contracting parties ought to be satisfied with, the law will say he is satisfied with.*

And the assent to a sale may be conditional, and in such cases the formation of the contract does not take place until the condition is accomplished, thus goods are sold "on trial," "to arrive," and on bargains known as "sale or return," are instances where the assent is conditional, and the contract remains in abeyance until the happening of the specified condition. This class of sales will be considered in a subsequent Chapter.**

good the picture, the purchaser was the only judge whether it suited him or not, and if not he could not be compelled to pay for it. *Wood Machine Co. v. Smith*, 50 Mich. 565.

**Duplex Boiler Co. v. Gardner*, 101 N. Y. 387; *Meisell v. Insurance Co.*, 76 N. Y. 115. So where the purchaser is in fact satisfied, but fraudulently and in bad faith declares he is not satisfied with the article after the contract has been fully performed by the vendor he is bound to accept any pay for the article.—*Silsby Mfg. Co. v. The Town of Chico*, 24 Fed. Rep. 893.

**See Post Chapter vi.

CHAPTER III.

CONCERNING THE THING SOLD AND THE PRICE.

Sec. 1063. SALE OF A THING WHICH HAS CEASED TO EXIST VOID.—“As there can be no sale without a thing, transferred to the purchaser in consideration of the price received, it follows that if at the time of the contract the thing *has ceased to exist*, the sale is void.”* Thus where an annuity dependent upon a life was the subject of sale, and it subsequently appeared that the life had terminated prior to the date of the sale, the sale was void, and the price paid was recovered in assumpsit as money had and received.** Cases of this sort are sometimes decided on the ground of an implied warranty on the part of the vendor that the thing sold exists; sometimes on the ground of failure of consideration, and also on the ground that there has been no contract at all, the assent being founded upon a mutual mistake amounting to no assent, there being no subject-matter for a contract, no contract could therefore be completed. Mr. Benjamin gives this latter ground as the true one.***

It being impossible to transfer and deliver an article which has really ceased to exist, the law imposes

*Benj. Sales, 76.

**Strickland v. Turner, 7 Ex. 208; Hastie v. Couturier, 9 Ex. 102.

***Benj. Sales, 77; Farrar v. Nightingal, 2 Esp. 639.

no liability for a failure to perform such a contract. And this is so whether such impossibility exists at the time of the sale, as in the case mentioned, or arises afterwards but before the contract is to be executed. Thus where a contract is made for the sale or delivery of a specified article of personal property under circumstances such that the title does not vest immediately in the vendee, that is, an executory contract of sale, and the property is destroyed by accident, without the fault of the vendor, the delivery thereby becomes impossible, the vendor is not liable to the vendee in damages for the non-delivery.*

Sec. 1064. SALE OF THINGS NOT YET IN EXISTENCE.—A thing may be the subject of a valid sale though not yet in existence, but it is necessary

*Dexter v. Norton, 47 N. Y. 62; Young v. Bruces, 5 Litt. 324; Carpenter v. Stevens, 12 Wend. 589; Harris v. Nicholas, 5 Munf. 483; Gibson v. Pelkie, 37 Mich. 380; and see Sec. 428 No. 4 Home Law School Series. In a few cases it is held that inevitable accident, or act of God, will excuse the performance of a duty created by law, but not one created by man. So where A had contracted to erect a school-house and to have it completed by the first of May, and on the 27th of April it was struck by lightning and burned down, notwithstanding this accident A was held liable in damages for a failure to finish the building in time. These cases are in accordance with the principle that where a person contracts to do anything absolutely impossible at the time, he is not excused unless 1st. The performance is prevented by the other party, or 2nd, the performance is made unlawful by statute. Thus contracts for the sale of liquors where forbidden by statute are examples where the non-performance will be excused. Carpenter v. Stevens, 12 Wend. 589; Adams v. Nichols, 36 Mass. 275.

here to again distinguish between executed contracts of sale and executory contracts of sale. For this purpose things *not yet in existence* may be regarded as of two sorts, one of which may be sold or the subject of an executed contract, the other can only be the subject of an agreement to sell or an executory contract.*

In order that things not yet in existence should be the subject of an executed sale they must have a *potential existence*. By potential existence is meant that the things are to come into being as the natural product or expected increase of something already belonging to the vendor. Thus a valid sale may be made of the wine which the vineyard is expected to produce; of the grain the field is expected to yield, or the milk a cow will give. One may sell a crop of grain to be delivered in the future although the crop has not yet been planted, provided the vendor owns, or has rented the land wherein it is to be planted.**

*Benj. Sales, 78.

**Briggs v. United States, 143 U. S. 346, 354; Rawlings v. Hunt, 90 N. C. 270; Sanborn v. Benedict, 78 Ill. 309; Wilkinson v. Ketler, 69; Ala. 435. So the unborn young of animals may be sold, during gestation, and some cases hold before gestation. Hull v. Hull, 48 Conn. 250; McCarty v. Blevins, 5 Yerg. 195; Maize v. Bowman, 93 Ky. 205. A mortgage in May of all the butter and cheese to be made this season, by a lessee of the cows, held good, Conderman v. Smith, 41 Barb. 404; Headrick v. Brattain, 63 Ind. 438; Arques v. Wasson, 51 Cal. 620. But a sale of "all the hay that is to be cut on the farm I have bought of—" is not good against a *bona-fide* purchaser of the fifth year's crop after the same had been harvested.—Shaw v. Gilmore, 81 Me. 396.

Where the things to be acquired have not a potential existence one can only make a *valid agreement to sell, not an actual sale*. Thus the wool of any sheep, or the milk of any cows that may be bought within the year, or the goods one may buy within the next year, or the fish one may catch in the future, are examples where an actual present sale cannot be made, but only an executory agreement to sell.* So the sale of future wages unconnected with some actual present contract of wages is invalid and passes no title to the vendee for the want of a subject-matter, likewise the transfer of all the fees to be received by a professional man.** There can be no actual sale of a mere expectancy or possibility.

Where the subject of sale has a potential existence and the sale is executed, the title to the goods, though not yet in existence passes, and if there is any loss it falls upon the purchaser. While things not yet in existence and not having a potential existence can be the subject of a valid agreement to sell, no title passes and the risk of loss remains in the vendor.*** In this case though the sale is void the contract to sell may be good.

Although the actual sale of an expectancy or possibility is void, yet the agreement to sell is so far good,

*Benj. Sales, 78; Low v. Pew, 108 Mass. 347.

**Skipper v. Stokes, 42 Ala., 255; Hartley v. Tapley, 2 Gray, 565; Gardner v. Hoeg, 18 Pick. 168; Schouler's Sales, 194; Lunn v. Thornton, 1 C. B. 379; Gale v. Burnell, 7 Q. B. 850; Hope v. Hayley, 5 E. & B. 830.

***Benj. Sales, 78.

that if the vendor by some act done after the acquisition of the goods, wages, fish, or the like, shows his intention to give effect to the original agreement, the sale will then become effective and the vendor can no longer object to its validity.* So it is held that the agreement to sell operates as a license and when possession is taken by the vendee subsequently and before the rights of third persons intervene, the title will vest.**

In Equity, such agreements are upheld, especially as between the parties, if the property is sufficiently described so as to be identified. And in England the

*Dalton v. Laudahn, 27 Mich. 529; Pierce v. Emery, 32 N. H. 484; Pennock v. Coe, 23 How. 117.

**Perkins v. Bank, 43 S. C. 39; Chapman v. Weimer, 4 Ohio St. 481; Chase v. Denny, 130 Mass. 566.

It is to be remembered that such agreements are frequently valid as between vendor and vendee, and void as to attaching creditors, second purchasers and the like. Thus in *Chesley v. Josselyn*, 7 Gray 489, where A had purported to mortgage property thereafter to be acquired, and after it was acquired sold it to B with the other mortgaged property, it was held that B could claim such property against the mortgagee, although his bill of sale described the property as "subject to a mortgage," since the mortgage could not legally apply to the after-acquired property. So the expressly providing in a bill of sale or mortgage that it shall apply to after-acquired property, is generally held at law to make no difference, it being not a question of intention, but of power. *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570; *Hunter v. Bosworth*, 43 Wis. 583; *Bank v. Lindenstruth*, 79 Md. 136; *Wright v. Bircher*, 5 Mo. App. 327. Otherwise if the mortgagee or purchaser takes possession of such property before the rights of other persons intervene he takes a good title. *Cook v. Corthell*, 11 R. I. 482; *Rowan v. Rifle Co.* 29 Conn. 283.

equity rule has by statute been adopted in law. But the transfer must be absolute and the property to be acquired sufficiently described.*

A sale by a son of his expected interest as heir to his father's estate, made to a stranger without his father's knowledge is not valid at law, although a covenant to convey might be good.**

Where a person sells a thing that does not belong to him, or makes a contract of "sale or return," and though not having title at the time subsequently acquires title before the purchaser repudiates the contract, the property in the thing sold will vest in the purchaser. (Benj. Sales, 83.)

It was held in an early English case (*Bryan v. Lewis*, Ry. & Moo. 386) that where goods sold for future delivery, the seller not having them or any present contract, but intending to go in the market and buy before delivery that the contract was invalid as a mere wager on the price of the articles, but this decision has been overruled, and such contracts to sell and deliver at a future day articles which the party can acquire are now ordinary commercial transactions.*** But if the parties do not contract in good

**Mitchell v. Winslow*, 2 Story, 630; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Morrill v. Noyes*, 56 Me. 458; *Lazarus v. Andrade*, 5 C. P. Div. 318.

***Needles v. Needles*, 7 Ohio st. 433; *Bownton v. Hubbard*, 7 Mass. 112; *Fitch v. Fitch*, 8 Pick. 480.

****Hibblewhite v. M'Morin*, 5 M. & W. 462; *Mortimer v. M'Callan*, 6 M. & W. 58; *Pickering v. Cease*, 79 Ill. 328; *Bruas' Appeal*, 55 Pa. St. 294; *Gregory v. Wendell*, 39 Mich. 337; *Melchert v. Am. Union Tel. Co.*, 11 Fed. Rep. 193; *Dunn*

faith, intending an actual delivery and receipt of the good sold, but on default intend to settle the contract on the basis of the difference in price at the time the contract was entered into and the date of the performance, then it is a gambling contract and illegal. It is of no legal importance that speculation is the object, but both parties must concur in the illegal intent to make it a gambling contract and void, neither party being allowed to enforce it. A number of States have statutes forbidding gambling in stocks.*

II. THE PRICE.

Sec. 1065. THE PRICE MAY BE EXPRESS OR IMPLIED.—The price imports the application of a money valuation to the thing sold, and whether paid in money or money's worth does not matter. If the seller agrees to take something else in exchange it is said that the price may be either in money or in property, but if there was a price put upon the goods it would not be an exchange.**

It is a rule that there must be a fixed price, but where the price is ascertainable from the contract,

v. Bell 85 Tenn. 581; Billingslea v. Smith, 77 Md. 504. Both parties must concur in the illegal intent. Williams v. Tiedemann, 6 Mo. App. 269; Murry v. Ocheltree, 59 Ia. 435; 97 Ind. 210; And see this subject under the head "Avoidance of the Contract" in a subsequent chapter.

*Clarke v. Foss, 7 Bliss. 541; Phillips v. Ocmulgee Mills, 55 Ga. 58, 633.

**19 Mo. App. 183; 90 Mass. 297; In New York the price may mean an equivalent or compensation, whether in money or other property, 54 N. Y. 173.

that is, where the contract furnishes a true test directly or indirectly by which to determine the price without the need of further negotiation between the parties, there is a fixed price within the meaning of the law. Thus a price is considered fixed and determinate which is to be fixed by the valuers appointed by the parties, or which is to depend upon the market price of the commodity sold.*

If nothing has been said as to the price when an article has been sold, the law implies an understanding that the price is what the article is reasonably worth, that is, the price is implied, just as a contract may be implied from the acts of the parties.* By the delivery of an article to a buyer and its acceptance by him it is implied that he will pay what the article is reasonably worth where no price has been agreed upon. A reasonable price may or may not be the same as the current market price. But ordinarily "reasonable price" is governed by the market price at the time and place of delivery, unless the market is shown to be unnaturally inflated.**

*In *McConnell v. Hughes*, 20 Wis. 537, "ten cents a bushel less than the Milwaukee price, on any future day the vendor might name," was held to be a fixed price. *Cunningham v. Brown*, 44 Wis. 72; *Ames v. Quimby*, 96 U. S. 324; so "highest market price, whenever the vendor may demand payment" was held to be fixed, *McBride v. Silverthorn*, 11 Up. Can. Q. B. 545, and a "reasonable price to be afterwards agreed upon," *Greene v. Lewis*, 85 Ala. 222.

***McEwen v. Morey*, 60 Ill. 32; *Kountz v. Kirkpatrick*, 72 Pa. St. 376. It is now elementary law that if no price is fixed by the parties to a contract of sale the law will imply

Where a sale is made provided that the price is to be afterwards agreed upon by the parties, and this is never done, the sale is not completed so as to pass title.* And where the parties disagree as to what price has been agreed upon, the real value of the article is always admissible in evidence as tending to show which of them is in the right.** Where the parties have agreed that others shall fix the price, the sale is not ordinarily complete so as to pass the title until the price has been so fixed, unless one of the parties prevents it, in which case his act is equivalent to actual performance.***

that the price is what the article is reasonably worth, and this applies to both executed and executory sales, so that the vendor can recover from the buyer for a refusal to accept. *Hoadly v. M'Laine*, 10 Bing. 482; *Taft v. Travis*, 136 Mass. 95; *McEwen v. Morey*, 60 Ill. 32; *Lovejoy v. Michels*, 88 Mich. 15.

**Bigley v. Risher*, 63 Pa. St. 152; *Wittkowsky v. Wasson*, 71 N. C. 451.

***Norris v. Spofford*, 127 Mass. 85; *Johnson v. Harder*, 45 Ia. 677; *Saunders v. Clark*, 106 Mass. 331.

****Fuller v. Bean*, 34 N. H. 290; *Hutton v. Moore*, 26 Ark. 382; *Smyth v. Craig*, 3 W. & S. 14.

CHAPTER IV.

EFFECT OF THE STATUTE OF FRAUDS ON SALES.

Sec. 1066. THE STATUTE OF FRAUDS.—17TH SECTION.—The common law recognized the validity of verbal contracts of sale for any amount and however proved. But in 1677 this ancient common law doctrine was greatly modified by the statute of 29 Car. II. c. 3, the fourth and seventeenth sections of which apply to contracts and sales. This statute has already been considered in a previous number of The Home Law School Series.*

The 17th section of the English statute is as follows:

“And be it enacted, that from and after the said four-and-twentieth day of June (A. D. 1677), no contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”**

*See Vol. 4, Secs. 464-469.

**This section is now replaced in England by the Sale of Goods Act of 1893, as is the Act of 9 Geo. IV. c. 14, s. 9, known as “Lord Tenterden’s Act.”

This section of the Statute of Frauds has been adopted in most of the American States in almost the same wording of the original act.* The price of the thing sold which comes within the statute is mostly fixed at \$50 in the various States, but in some it is more, in California the amount is \$200 and in Utah \$300. In a few States this section is not in force.**

The purpose of the statute of frauds is to prevent fraud and falsehood by requiring the party who seeks to enforce an oral contract in court, to either; first, produce as additional evidence some written memorandum signed by the party sought to be charged, or second, the proof of some act confirmatory of the contract relied upon.

The English statute provides, "no contract shall be allowed to be good"; the Michigan statute provides, "no contract shall be valid"; in Massachusetts the statute reads, "shall be good or valid." But it is now generally held that it is not the intention of the statute to prohibit the making of such contracts or to declare them void or illegal when made simply because

*The statute in Michigan reads: "No form of sale of any goods, wares, or merchandises, for the price of \$50 or more, shall be valid unless the purchaser accept part of the goods sold, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged therefore, or some person thereunto by him lawfully authorized." How. Stat. Mich. Sec. 6186.

**It is not in force by statute in Delaware, Illinois, Kansas, Miss., North Carolina, Ohio, Pa., Rhode Island, Tenn., Texas and Virginia.

of the absence of the required formalities. The true construction of the statute is not to render the contract within it void, still less illegal, but its purpose is to make the kind of evidence required indispensable when it is sought to enforce the contract. That is, the evidence to prove such a contract must be in writing unless you have confirmatory acts. Hence such contracts are not void, but when they are sought to be enforced in court the party seeking to do so must have confirmatory acts or the required memoranda signed by the party sought to be charged.*

Notwithstanding numerous dicta and authorities holding that unless the provisions of the 17th section are complied with the sale is void, the better opinion seems to be that such contracts are voidable, not void.** But the property and title remain in the seller unless the statute has been complied with, and the buyer acquires no right thereto, is not liable un-

*118 Mass. 325; *Maddison v. Alderson*, 8 App. Cas. 488. In Maine it is said that the statute makes certain things indispensable to the remedy. The security conferred by the statute makes the remedy depend upon reliable proof to which the parties may resort to settle their disputes. 73 Me. 186. In New York the language of the statute is, "every contract of sale shall be void," yet notwithstanding this language it is held that the statute of frauds does not condemn verbal contracts for the sale of goods. 53 N. Y. 114; 56 N. Y. 238.

**29 Am. & Eng. Encyc. Law, (2nd ed.), page 814; *Leroux v. Brown*, 74 E. C. L. 801; *Patterson v. Ware*, 10 Ala. 444; *Beryhill v. Jones*, 35 Ia. 335; *Gammion v. Butler*, 48 Me. 344; *Townsend v. Hargraves*, 118 Mass. 325. *Contra*, *Howe v. Palmer*, 3 B. & Ald. 321; *Hinchman v. Lincoln*, 124 U. S. 38; *Hudnut v. Weir*, 100 Ind. 501; *Mayer v. Child*, 47 Cal. 142.

der the contract and has no right to action against the seller.*

The effect of the contract within the statute being voidable allows the parties to carry it out if they see fit, and if performed by them it is of the same force and validity as other contracts. If such a contract be executed the effect of its performance is such as to warrant the enforcement of rights and obligations arising therefrom.**

In those states where the statute is the substance of the 17th section of the English Act, the objection that the contract is not valid for being within the statute is not available to a party not privy to the contract. That is, a third person cannot set up the fact that it was not in writing. The defense of the statute of frauds is personal, and can only be relied upon by the parties to the contract or their representatives or privies.***

*29 Am. & Eng. Encyc. Law, 2nd. ed. 998-999; *Pitney v. Ins. Co.*, 65 N. Y. 6; *Hicks v. Cleveland*, 48 N. Y. 84; *Bacon v. Eccles*, 43 Wis. 227; *Alexander v. Comber*, 1 H. Bl. 20; *Tempest v. Fitzgerald*, 3 B. & Ald. 680. So if the property is injured or destroyed, where the contract of sale is unenforceable for want of complying with the statute all loss falls upon the seller, before the acceptance of the buyer. *Rodgers v. Phillips*, 40 N. Y. 519; *Daniel v. Frazer*, 40 Miss. 507.

**52 Mich. 365; *Mooney v. Elder*, 56 N. Y. 238; Am. & Eng. Encyc. Law, 2nd. ed., page 818.

****Moore v. Crawford*, 130 U. S. 122; *Mewburn v. Bass*, 82 Ala. 622; *Davenport Church v. Swanson*, 100 Ill. App. 39; *Jackson v. Stanfield*, 137 Ind. 592; *James v. Hicks*, 58 Mo. App. 521; *Christy v. Brien* 14 Pa. St. 248.

In some states if the contract is partly within the statute of frauds and partly without, and the contract is separable, it may be separated and an action maintained on so much of it as is not within the statute*

A discussion of the Statute of Frauds in its effects upon sales naturally divides itself into the following subjects: 1. What contracts are embraced under the 17th section? 2. What classes of personal property are comprehended under "goods, wares and merchandises"? 3. What standard of price or value brings the case within the statute? These will now be considered briefly.

Sec. 1067. WHAT CONTRACTS ARE EMBRACED UNDER THE 17TH SECTION?—We have seen that in an executory contract the contract is binding so as to give either of the parties a remedy against the person who is in default, but has no effect to transfer the title or right to the possession of or in the goods themselves. Such a contract gives the proposed purchaser none of the rights, and subjects him to none of the liabilities of the owner of the property. While on the contrary a *bargain and sale* or executed contract, vests the absolute and general property in the thing sold in the purchaser. Now the language of the 17th section is, "no contract for the sale of any goods,"

*Friend v. Pettingill, 116 Mass. 515; Rainbolt v. East, 56 Ind. 538; Dietrich v. Hefelmeir, 128 Mich. 145. But an alternative contract is not severable, so as to enforce the part not within the statute. Mather v. Scoles, 35 Ind. 1; Howard v. Brower, 37 Ohio St. 402.

and the first question seems to have been, what is the meaning of these words? Are they applicable to executory agreements, or only such as were an equivalent at common law to the contract known as bargain and sale? In England until 1828, the decisions were in conflict and leaned to the conclusion that executory agreements did not come within the operation of the statute.* Then the legislature intervened, and in 9 Geo. IV. c. 14, s. 7, known as Lord Tenterden's Act, declared that thereafter the provisions of the 17th section of the Statute of Frauds "shall extend to all contracts for sale of goods of the *value* of ten pounds sterling, and upwards, notwithstanding the goods may be intended to be delivered at some future time, or not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." This enactment is now construed with the statute of frauds and its effect is to substitute the word *value* for *price* in the 17th section.** This is the holding in America also.

The next question is to ascertain the proper principle by which to test whether certain contracts are contracts for the sale of goods, or for work and labor to be performed and materials furnished. There is con-

*Towers v. Osborne, 1 Strange, 506; Groves v. Buck, 1 M. & S. 178; contra, Rondeau v. Wyatt, 2 H. Bl. 63.

**Benj. Sales, Sec. 93; Scott v. Railway, 12 M. & W. 33; Ide v. Stanton, 15 Vt. 685; 29 Conn. 513; 15 N. J. L. 252; 18 Me. 137; 33 Mo. App. 183; 48 Mo. 379.

siderable conflict in the decisions both in England and in the various states as to this question.

In 1861, the rule was laid down by Lord Blackburn in England that if the contract be such that when carried out *it will result in the sale of a chattel* the party cannot sue for work and labor done but must sue for goods sold and delivered; while if the work and labor be bestowed in such a manner as that the *result would not be anything which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy.**

Prior to Lord Blackburn's there were three different rules suggested by the English courts to distinguish contracts for the sale of goods from those for work and labor and materials. These were: 1. That if the subject matter of the contract was not in existence, not *in rerum natura*, as Lord Ellenborough expressed it, the contract was not for the sale of goods.** 2. The second test principle suggested was that if the materials be furnished by the employer, the contract is for work and labor, not for a sale; but if the materials be furnished by the workman who

*Lee v. Griffin, 30 L. J. Q. B. 252; in this case Crompton J., said: "When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered;" Hill J., said: "When the subject-matter of the contract is a chattel to be afterwards to be delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labor."

**Groves v. Buck, 3 M. & S. 178; Garbutt v. Watson, 5 B & A. 613.

makes up a chattel he cannot maintain "work and labor," since his labor was bestowed on his own materials and for himself, and not for the person who employed him.* 3. The third test principle prior to the settling of the matter in *Lee v. Griffin*, was by Pollock, C. B. in *Clay v. Yates*,** who held the proper test to be, "Whether the work and labor is of the essence of the contract, or whether it is the materials that are found." All of these tests have given place to the one laid down in *Lee v. Griffin*. A contract for the furnishing of a machine or a movable thing of any kind and fixing it to the freehold, is not a contract for the sale of goods within the statute but for work and labor done and materials furnished in adding to the land.***

The same diversity of opinion is found in the American decisions, and different rules have come to prevail in the various states. In *Lamb v. Crafts* (12 Metc. 356), Chief Justice Shaw said: "the distinction we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise when the article is made pursuant to the agreement." Thus where the plaintiff a carriage maker had several unfinished

**Smith v. Surman*, 9 B. & C. 561-8; *Atkinson v. Bell*, 8 B. & C. 277.

**25 L. J. Ex. 237; 1 H. & N. 73.

****Tripp v. Armitage*, 4 M. & W. 687; *Clark v. Bulmer*, 11 M. & W. 243.

buggies on hand, the defendant selected a particular lining of plaintiff, and the latter agreed to finish a buggy in a fortnight for \$250. In an action for the price, held, not a sale of the buggy, but an agreement to build one for the defendant, and on his part to accept and pay for it, and therefore not within the statute.* So where the defendant went to a carriage maker, and ordered a buggy, giving directions that the lining should be drab, the outside seat of cane, with his initials and monogram, and to be completed in four months, held, not a contract for the sale of the buggy, but for labor, services and materials, and so not within the statute.** This Massachusetts rule is followed in other states.

But under the Massachusetts rule, if the article ordered by the purchaser is exactly such as the plaintiff makes and keeps on hand for any one, and no change or modification of it is made at the defendant's request, it is a contract of sale, and within the statute, even though made after, and in consequence of the order given.***

The New York doctrine is that executory contracts with reference to articles already in existence are

**Mixer v. Howarth*, 21 Pick. 205 (1838); *Spencer v. Cone*, 1 Metc. 283.

***Goddard v. Binney*, 115 Mass. 450 (1874); *Dowling v. McKenny*, 124 Mass. 480; *Hight v. Ripley*, 19 Me. 137; *Abbott v. Gilchrist*, 38 Me. 260; *Pitkin v. Noyes*, 48 N. H. 294; *Ellison v. Brigham*, 38 Vt. 64.

****Gardner v. Joy*, 9 Met. 177; *May v. Ward*, 134 Mass. 127; *Edwards v. Railway*, 48 Me. 379; *Prescott v. Locke*, 51 N. H. 94.

within the statute of frauds, but agreements to sell and deliver, in the future, articles which have no existence at the time and are to be delivered hereafter, are not within the statute of frauds.*

In Maine the principles are supposed to be reconciled by following the rule, that the fact that the article contracted for does not exist at the time of the contract, but is to be made or manufactured will not necessarily take the case out of the statute, but it must appear in addition that there is a particular person for whom it is to be manufactured, or a particular mode or manner, or a particular material entering into and making part of the contract.**

In Iowa by statute it is provided that the statute shall not apply when the article is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill, or money are necessary to be expended in producing or procuring it. (Iowa Code Sec. 3664.)

These conflicting authorities are reduced to three principles of construction by Schouler in his work, (Per. Prop. Sec. 443.) these are:

1. The Narrow Construction. Where the chattel contracted for does not exist in specie but requires to be manufactured and brought into being under the contract, there is no contract of sale within the statute, but it is a contract for work and labor done and ma-

*Crookshank v. Burrell, 18 Johns. 58; Mead v. Case, 33 Barb. 202; Parsons v. Loucks, 48 N. Y. 17; Deal v. Maxwell, 51 N. Y. 652.

**Crockett v. Scribner, 64 Me. 447; 54 Me. 105.

terials furnished. This construction is repudiated in England, but is said to have a firm hold in New York.

2. The Broad Construction. Whatever be the contract, whether the chattel is existing or non-existing, where it is in substance for goods to be sold and delivered, and not for work, labor and materials, and which therefore results in the sale of the subject-matter for a price, it comes within the statute as a contract of sale.

3. The Middle Construction. Between these two extremes may be said to stand the Massachusetts rule, which is, that the statute applies not only to contracts for articles existing already, but to such as the seller ordinarily makes or procures for the general market, but not to a contract for an article to be manufactured especially for the purchaser.

Sec. 1068. SAME SUBJECT. — AUCTION SALES.—It is now well settled that auction sales are included within the statute of frauds.* So also are sales by sheriffs on execution, and public sales generally to the same extent as private sales. In Michigan there is a statute which requires that when goods are sold at auction the auctioneer shall at the time of the sale enter in a book a memorandum specifying the particulars and manner of sale, mentioning the purchaser's name and the name of the person on whose account the sale was made, and such a memorandum

*Davis v. Rockwell, 2 Pick. 64; Pike v. Balch, 38 Me. 302; Johnson v. Buck, 35 N. J. L. 328; Boyd v. Greene, 162 Mass. 567.

is deemed a sufficient memorandum of the contract within the meaning of the statute of frauds.

Sec. 1069. SAME SUBJECT.—RESCISSION.—Where one agrees to rescind, as by agreeing orally with the purchaser to take back the article sold on request, and repay the purchase money, this promise is binding, though oral, since it is a part of the original bargain and made valid by the original delivery and payment therefor. While a subsequent agreement to take back the goods in payment of the bill is within the statute.*

Sec. 1070. WHAT ARE GOODS, WARES, AND MERCHANDISES?—In England it held that the 17th section does not apply to shares, stocks, documents of title, choses in action and other incorporeal rights in property.**

Aside from the statutes passed in the respective American states, perhaps the leading case in this country holding the contrary of the English decisions, and adopting a broader construction of the phrase "goods, wares, and merchandises" is the Massachusetts case of *Tisdale v. Harris*,*** decided in 1837 by Chief Justice Shaw. In this case it was decided that stocks are fairly within the statute, as well by its terms as by general quality. The words "goods, wares, and

**Fay v. Wheeler*, 44 Vt. 202; *Johnston v. Trask*, 40 Hun, 415; 116 N. Y. 141; *Rankin v. Grupe*, 36 Hun. 481.

***Humble v. Mitchell*, 11 A. & E. 205; *Knight v. Barber*, 16 M. & W. 66; *Benj. Sales*, Sec. 111.

***20 Pick. 9; *Walker v. Supple*, 54 Ga. 178.

merchandises," have, as to the first two a very broad signification. *Bona* (goods) as used in the Civil law is almost as extensive as *personal property*, and in many respects has nearly as large a signification in the Common law as the word merchandises has in commercial usage. There is nothing in the nature of stocks and shares in incorporated companies which in reason and sound policy should exclude contracts in respect to them from the restrictions designed by the statute to prevent fraud in the sale of commodities. This holding is quite generally followed in America.*

In Indiana later decisions have narrowed the construction of the word "goods" to include only corporeal property in conformity with the English decisions. (40 Ind. 593.)

The statute of New York, and some other States, expressly adds the words "things in action" to the phrase "goods, wares and merchandises," and hence requires all contracts for the sale of choses in action and incorporeal property to be in writing.**

*Boardman v. Cutter, 128 Mass. 388; Banta v. Chicago, 172 Ill. 204; Pray v. Mitchell, 60 Me. 430; bank bills, Gooch v. Holmes, 41 Me. 523; notes of third persons, Baldwin v. Williams, 3 Met. 367; Greenwood v. Law, 55 N. J. L. 168—have been held to be within the statute.

**Truax v. Slater, 86 N. Y. 630; Doty v. Smith, 62 Hun, 598. But a contract to sell shares of stock in a company not yet incorporated is not within the statute, Green v. Brookins, 23 Mich. 48; nor is a contract to dispose of an invention before letters patent had been obtained, Somerby v. Buntin, 118 Mass. 285; Blackeney v. Goode, 30 Ohio St. 350.

Sec. 1071. SAME SUBJECT.—FIXTURES, GROWING CROPS, ETC.—The next question is whether unsevered crops growing upon the land are within the 17th section when contracts are made for their sale. Here it is necessary to recall the 4th section of the statute of frauds, which provides that no action shall be brought upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning these things unless the agreement is in writing, hence a sale of growing crops, fixtures and the like come within the statute, but under which section of the statute do they come—an interest in real estate, so that the contract must always be in writing? or are they goods, etc., such that a sale is made valid by part payment, or acceptance and receipt?

1. As to fixtures, or things artificially annexed to the freehold, if when these are sold it is contemplated that they are to be severed and carried away, it is a sale of personal property and not of real estate.* The same rule applies to buildings temporarily placed upon the land of another by his previous consent; these continue to be, as between the parties, the personal property of the builder, and if sold by him, fall under the 17th section of the statute and not under the 4th.** But if such fixtures are so attached to the land, a deed

*Strong v. Doyle, 110 Mass. 92; Scales v. Wiley, 68 Vt. 39; Bostwick v. Leach, 3 Day 476. These cases hold that millstones, running gear, manure, a removable building, are all sales of personal property.

**Dame v. Dame, 38 N. H. 429; Rogers v. Cox, 96 Ind. 157; Long v. White, 42 Ohio St. 59; Morris v. French, 106 Mass. 326.

of the land owner to a *bona-fide* grantee, ignorant of the separate ownership of the buildings, will convey them, and the builder will have to look to the grantor for redress.*

2. As to natural productions (*fructus naturales*), such as grass, fruit, growing trees, and the like, the prevailing rule is, that if at the time of the contract the thing is to be immediately, or within a reasonable time severed from the soil and carried away, and is not to be left to mature, the sale is that of personal property, and not an interest in land, regardless as to who is to sever it from the soil.** But if the contract clearly contemplates that growing trees are to remain in the soil, either a fixed time, or indefinitely at the pleasure of the vendee, and derive future benefit therefrom, then the transaction involves an interest in land, and comes within the 4th section, and the sale must be in writing.***

3. As to artificial or annual crops, (*fructus industriales*), the law is well settled, that a sale thereof is a sale of personal property, regardless of their present development or the length of time they are to remain in the soil to complete their growth. Contracts

*Bank v. Machine Works, 127 Mass. 542; Landon v. Platt, 34 Conn. 517.

**Hirth v. Graham, 50 Ohio St. 57; Whitmars v. Walker, 1 Met. 313; Banton v. Shorey, 77 Me. 48; Purner v. Piercy, 40 Md. 212, holding the rule to apply to standing trees, grass ready to be cut, fruit, nursery stock, and the like.

***Green v. Armstrong, 1 Denio, 550; Daniels v. Bailey, 43 Wis. 556; White v. Foster, 102 Mass. 375.

for the sale of such crops fall within the 17th section and not the 4th.*

Sec. 1072. CONSTRUCTION OF THE WORDS "PRICE OR VALUE OF TEN POUNDS OR UPWARDS."—What is the proper construction of the words "of the price or *value* of ten pounds and upwards"? In the statutes in the various States sometimes the word *price* is employed and sometimes the word *value*. The word *amount* is also used in some statutes. The difficulty arises in determining as to the entirety of the contract. Thus, if a person buys several articles which in all aggregate more than the amount named in the statute as coming within its terms, but some of the articles not costing separately enough to bring them within the statute, the question arises, is the *price* to be applied to each thing considered separate, or to the aggregate value? This question is to be determined by the facts if there is no dispute. In a case where the defendant bargained for several articles, and a separate price was agreed to for each lot or parcel, no one of them amounting to ten pounds; some were measured in his presence, some he marked with a pencil, desiring the whole amount sent to his house, and when sent it amounted to 70 pounds, the court held that this was an entire contract and within the 17th section as to price.**

*Bricker v. Hughes, 4 Ind. 146; Bull v. Griswold, 19 Ill. 631; Poley v. Johnson, 52 Kans. 478.

**Baldey v. Parker, 2 B. & C. 37. In this case Abbott, C. J. said: "Looking at the whole transaction, I am of opinion

Many American authorities hold that if a distinct contract is created as to each lot or parcel, and each is below the statutory price, it is not within the statute.* This would seem to follow from the doctrine that where several articles are sold for a separate price as to each, the fact that the sale of some of the articles is illegal, will not affect the sale of those articles which are legal.

In England, and by some authorities in America, in auction sales a separate price and contract is held to arise in the purchase of each lot, and especially is this true if other sales to other parties intervened.**

But in *Jenness v. Wendell*, (51 N. H. 63), it was held that the purchaser of furniture and stable stock at auction and upon the same terms, but in separate lots and separate bids, and at separate prices, had

that the parties must be considered to have made one entire contract for the whole of the articles." Holroyd J. said: "This was all one transaction though composed of different parts. At first it appears to have been a contract for goods of less value than ten pounds, but in the course of the dealing it grew to a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the Statute of Frauds, it being the intention of that statute that, where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of ten pounds, it should not bind unless the requisites there mentioned were complied with."

**Goodwin v. Clark*, 65 Me. 280; *Walker v. Lovell*, 28 N. H. 138; but a mere separate price for each, as 100 bushels of corn at \$1 a bushel, will not take the sale out of the statute, *Gilman v. Hill*, 36 N. H. 318; *Allard v. Greasert*, 61 N. Y. 1.

***Emmerson v. Heelis*, 2 Taunt. 38; *Wells v. Day*, 124 Mass. 38; *Stoddart v. Smith*, 5 Binn. 355.

made an entire contract at an aggregate price exceeding the limit of the statute, so that a receipt and acceptance of one lot would take the whole out of the operation of the statute.

The fact that it is uncertain at the time of the contract what the price will amount to, does not matter and if it finally does exceed the amount the statute applies.* So an oral sale of goods above the statute limit, with an agreement to do something else, the whole forming an entire contract, makes the whole invalid, while if the latter stipulation stood alone it might be valid.** The price in the English statute is ten pounds, in the States this amount varies, commencing with "any value" in Florida and Iowa, it rises in Arkansas, Maine, Missouri and New Jersey to \$30; in New Hampshire to \$33; in Vermont to \$40, and in most States to \$50; in Arizona to \$100; in California and Idaho, \$200; in Montana and Utah, \$300, while in Rhode Island no such provision exists.

Sec. 1073. EXCEPTIONS UNDER THE STATUTE OF FRAUDS.—There are three different exceptions or methods pointed out by which the contract may be made good which would be otherwise invalidated under the Statute of Frauds. These are: 1. Except the buyer shall accept part of the goods so sold and actually receive the same. 2. Except the buyer shall give something in earnest to bind the bargain,

*Bowman v. Conn, 8 Ind. 58; Watts v. Freind, 10 B. & C. 446; Brown v. Sanborn, 21 Minn. 402.

**Irvine v. Stone, 6 Cush. 508.

or in part payment. 3. Except some note or memorandum in writing of the bargain be made and signed by the parties to be charged or their agents duly authorized.

Sec. 1074. SAME SUBJECT—EXCEPT THE BUYER SHALL ACCEPT PART AND ACTUALLY RECEIVE SAME.—Under this head we note two things which must concur to take the contract out of the statute; (a) Acceptance, and (b) an actual receipt of the portion of the goods.

These two things do not mean the same thing, as there may be an actual receipt without acceptance; or there may be an acceptance without actual receipt. Lord Blackburn held that so long as the buyer can, without self-contradiction, declare that the goods will not be taken in fulfilment of the contract he has not accepted. The question so far as the Statute of Frauds is concerned, is not whether he ought to accept them, but whether he has accepted them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts. It matters not whether the grounds for refusal be foolish or frivolous. He may take possession of the goods but that is not an actual receipt within the meaning of the statute, it is evidence, and evidence only of acceptance. The receipt by the buyer may be for the very purpose of ascertaining whether or not he will accept them. If a party orders goods of a particular description of a carrier, and they are delivered to him, it is necessary for him to receive the same in order to examine it, and

it may be that he must try the goods by using them, but still it is in his power to say that he took them for the purpose of determining whether to accept or not. So receipt of goods by a carrier, where such receipt is sufficient delivery to the purchaser, is not acceptance by the purchaser so as to bind the contract. The carrier is agent to receive but not to accept for the buyer.*

Sec. 1075. SAME SUBJECT—WHAT CONSTITUTES AN ACCEPTANCE?—This question turns so generally upon the facts in each particular case that it is difficult to lay down any general rule. It may, however, be correctly stated:

1. When the facts and intentions of the parties are ascertained the court will say whether they constitute an acceptance; that is, when the facts are undisputed, if disputed, it is a question for the jury.**

2. Something more than mere words are necessary to constitute acceptance. There must be some act of the parties amounting to a transfer of possession, and an actual receipt by the purchaser so that the seller no longer retains a lien for the price.***

3. The acceptance of the goods must be in pursuance of the contract of sale, and with the intention

*Per Lord Blackburn in, *Blackburn on Sale*, 22, 23; *Caulkins v. Hellman*, 47 N. Y. 449.

***Howard v. Borden*, 13 Allen, 299; *Pinkham v. Mattox*, 53 N. H. 604; *Garfield v. Paris*, 96 U. S. 563; *Schwartz v. Church Etc.*, 60 Minn. 183.

****Caulkins v. Hellman*, 47 N. Y. 49; 47 Mich. 615; *Young v. Blaisdell*, 60 Me. 272; 129 Mass. 420; *Hinchman v. Lincoln*, 124 U. S. 40.

of the parties that the purchaser take possession as the owner.*

4. The buyer and seller must both acquiesce in the acceptance. (Ice Co. v. Webster, 62 Me. 341.)

5. The taking of a sample or the delivery of a sample of the goods may be an acceptance, but only when these samples are treated by both parties as part of the goods sold, and thereby diminishing by so much the quantity to be delivered afterwards.**

6. The acceptance of the goods, or part of them, as required by the statute, may be constructive only, and the question whether the facts proven amount to constructive acceptance is one for the jury. If a man deals with goods as owner, the jury may infer therefrom a constructive acceptance, since acts of ownership are hostile to the rights of the vendor. So if the buyer marks them with his mark, or examines them and has them set away, such acts are facts to go to the jury.***

The general rule may be stated as follows: if the vendee does any wrongful act to the goods, if he is not the owner, or of right, if he is the owner, the doing of those acts is evidence of acceptance,—not the acceptance, but *evidence* of acceptance.****

*Bowers v. Anderson, 49 Ga. 143; Marsh v. Hyde, 3 Gray 331.

**Gilbert v. Lichtenberg, 98 Mich. 417; 57 Wis. 765; 96 U. S. 557.

***Gray v. Davis, 10 N. Y. 285; 38 Ind. 214; 123 Mass. 141; 43 Wis. 238.

****Clarkson v. Noble, 2 Up. Can. Q. B. 361; Jones v.

7. Mere delivery is not sufficient; there must be acceptance and receipt by the purchaser.*

8. An acceptance by one of two or more joint purchasers will not be for the benefit of all, and therefore is not sufficient to take the case out of the statute.**

9. A dealing with the bill of lading by the buyer is as effectual in constituting acceptance as a dealing with the goods themselves. All the facts are evidence for the jury to determine whether there was a constructive acceptance. (*Meehan v. Sharp*, 151 Mass. 564.)

10. The purpose of requiring mutual receipt and acceptance of the goods, or part of them, is to prove that there was a contract of sale. If the vendor can prove acceptance of the goods or part of them, he proves the sale or contract of sale. But though the contract may be thus proved, the terms of the contract may be still in dispute.***

Bank, 29 Md. 287; thus a resale by the buyer is plenary proof of acceptance, *Hill v. McDonald*, 17 Wis. 97; *Marshall v. Ferguson*, 23 Cal. 65; *Meehan v. Sharp*, 151 Mass. 564. So a lease of an article to a third person is evidence of acceptance, 85 Hun, 537.

**Schmidt v. Thomas*, 75 Wis. 529; *Furniture Co. v. Furniture Co.*, 10 Utah, 31. Of course the buyer's authorized agent may accept. *Jones v. Bank*, 29 Md. 287; *Barkley v. Railway*, 71 N. Y. 205; but a common carrier is not ordinarily an agent to accept for the buyer, though specially designated to carry. *Agnew v. Dumas*, 64 Vt. 147; *Maxwell v. Brown*, 39 Me. 98; *Rindskoph v. De Ruyter*, 39 Mich. 1; contra, *Spencer v. Hale*, 30 Vt. 314.

**20 Mich. 410; 10 Mich. 319; contra, 22 N. J. L. 525.

***53 Me. 508; 37 Mich. 526; *Foy v. Wheeler*, 44 Vt. 292.

11. The acceptance need not be simultaneous with the receipt; it may precede or follow it.* The burden of proving acceptance is on the party alleging it, and ordinarily this is the vendor.**

Sec. 1076. SAME SUBJECT—WHAT CONSTITUTES AN ACTUAL RECEIPT.—At the time of making the contract of sale between the vendor and vendee, the goods may be in the actual possession—1. of the buyer as bailee or agent of the vendor; 2. of a third person, who may or may not be the agent of the vendor, and 3. in the possession of the vendor himself. This latter case being the most usual one.

1. In the first case the purchaser has the possession of the goods, and this being so it can be seen that there is some difficulty in determining when he is in actual receipt of them as the buyer under the provisions of the statute. But it seems to be well settled that the buyer though in possession may become purchaser by parol or oral agreement, and this takes place so far as actual receipt is concerned, when acts done by the buyer are inconsistent with the supposition that his former possession as agent has remained unchanged. If the buyer has possession before the sale and buys the property when does the actual receipt take place? There are several ways in which this may appear; he may attempt to sell the goods, or part of them, as his own, or he may do various other acts

*Hewes v. Jordan, 39 Md. 484; Cross v. O'Donnell, 44 N. Y. 661; Austin v. Boyd, 23 Mo. App. 317.

**Shepherd v. Pressey, 32 N. H. 49; Howard v. Borden, 13 Allen, 229.

which show intention on his part to receive the goods as his own. Such questions generally arise when something has happened to the goods about the time of the transfer, and each party is trying to shift the ownership upon the other.

2. When the goods are in the possession of a third person as agent or bailee, there is an actual receipt, when the vendor, purchaser and third person agree that the third person holds the goods not for the vendor, but holds them for the vendee, this constitutes actual receipt of the goods by the buyer within the meaning of the statute.* An order from the vendor to the bailee directing him to deliver the goods to, or hold them subject to the control of the buyer, is not sufficient, because it lacks the assent of the vendee. There must be evidence that the bailee has consented to hold them for the vendee and no longer for the vendor.**

The last stated rule not being uniform in the various jurisdictions, it may be stated thus: (a) To constitute an acceptance and receipt under the Statute of Frauds there must be an assent on the part of the person in whose custody the goods are, to hold them for the vendee. All of the authorities agree that this will be sufficient.***

*Carter v. Willard, 19 Pick. 1; Barney v. Brown, 2 Vt. 374; Caulfield v. Van Brunt, 173 Pa. St. 428; King v. Jarman, 35 Ark. 190.

**Safford v. McDonough, 120 Mass. 290; Marsh v. Rouse, 44 N. Y. 643; 54 Me. 105.

***95 Mass. 53; 16 M. & W. 119.

(b) Some cases seem to hold that a notice of the transfer of the property given to the bailee is sufficient, without the bailee's acceptance.* And (c) some cases hold that a bill of lading being a symbol of ownership of the goods covered by it, its transmission is such a transfer of the possession of the property which it covers as to meet the requirements of the Statute of Frauds.**

3. Where the actual manual delivery is inconvenient, impracticable or impossible because of the weight or size of the property, the law will not require actual delivery, but only require that the goods be placed in the power of the purchaser, or that his authority as owner be acknowledged by some formal act or declaration on the part of the seller. Thus where piles of pig iron at a furnace were delivered by being pointed out to the agent of the vendee, it was held to be all the delivery that could be made so far as the circumstances or the actual receipt was concerned; and likewise stacks of hay, trees cut and lying on the ground of vendor, logs lying loose in stream or in a boom, may all be transferred to satisfy the statute as to receipt without an actual manual delivery.***

But in all these cases there must be acts of such a character as to place the property in the power and ex-

*Boardman v. Spooner, 13 Allen, 353; Bassett v. Camp, 54 Vt. 232.

**6 M. & T. 194; 46 Wis. 191.

***28 Md. 396; 15 Vt. 221; 10 Wis. 422; 66 U. S. 476; 1 Minn. 56; contra, Shindler v. Houston, 1 Comst. (N. Y.) 261.

clusive dominion of the buyer as absolute owner, discharged of all liens for the price.*

There may be a receipt of part of the goods to make the contract valid, and yet leave the question open as to whether there has been an actual receipt of the bulk. The question here discussed concerns the validity of the contract and not of its performance.

It is well settled that the delivery of the goods ordered to a common carrier, whether designated by the purchaser or not, for conveyance to the buyer, constitutes an actual receipt by the purchaser, but not an *acceptance*, within the meaning of the statute.** Delivery of unordered goods to a carrier will not constitute either delivery or acceptance by the person to whom addressed.***

There may be an actual receipt by the vendee though the goods remain with the vendor, as where the vendor agrees to hold the goods as agent or bailee for the vendee. It should appear that the parties clearly agreed to the changed character of the vendor's possession.****

Sec. 1077. SECOND EXCEPTION—EARNEST TO BIND THE BARGAIN, OR PART PAYMENT.—The second exception to save an oral agreement from the operation of the Statute of Frauds is

*Marsh v. Rouse, 44 N. Y. 643; 20 Ill. 639; Spear v. Bach, 82 Wis. 192.

**Cross v. O'Donnell, 44 N. Y. 661; Fontaine v. Bush, 40 Minn. 141; 23 Md. 344.

***Grey v. Carey, 9 Daly, 363.

****Weld v. Came, 98 Mass. 152; 1 Tannt. 458; Means v. Williamson, 37 Me. 556; 23 Wis. 51.

"or give something in earnest to bind the bargain, or in part payment." This alone has to do with the validity of the contract. The giving of *earnest* has become obsolete, it being now regarded as the same thing as part payment. Earnest may be some gift or token or may be money. Among the Romans a ring was usually given by the buyer to the seller. Earnest meant money or money's worth, and must have value, though the amount was quite immaterial. In Massachusetts earnest as used in the Statute of Frauds is regarded as part payment of the price.* So where the buyer drew a shilling across the vendor's hand and which the witness called "striking off the bargain according to the custom of the country" and then returned the coin to his own pocket, the court held that nothing had been given in earnest to bind the bargain.**

So far as the payment of money is concerned, the part payment required by the Statute to bind a parole contract need not be made in money. Anything of value, which by mutual consent, is given the buyer and accepted by the seller instead of the price, will be equivalent to part payment.***

There must be payment, a promise to pay is not

*Benj. Sales, Sec. 189; *Donahue v. Parkman*, 161 Mass. 413.

***Blenkinsop v. Clayton*, 7 Taunt. 597; *Goodall v. Skelton*, 2 H. Bl. 316.

****Dow v. Worthen*, 37 Vt. 108, where a chattel was given; *Combs v. Bateman*, 10 Barb. 573, a third person's note. With reference to a third person's note it is held, that delivery of such note is absolute payment, while the delivery of a party's own note does not operate in this way.

sufficient.* But payment may be made by the discharge of a valid existing indebtedness. Where the agreement was that the debt of the seller to the purchaser should be applied as payment on the price of the goods purchased, but the application was not made, it was not sufficient payment to satisfy the statute.**

There must be a discharge of the precedent debt in order to satisfy the statute. (55 Ill. 522; 38 N. J. L. 536.)

It is not necessary that the part payment in money be made at the same time the contract is made, except in a few States. But the payment must be made before action brought.***

Sec. 1078. THIRD EXCEPTION—NOTE OR MEMORANDUM IN WRITING.—The third exception saving oral agreements is "or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The object of the Statute as to this point, is to require the signature to a written note or memorandum of the bargain,—not to the bargain itself, but a note or memorandum of it. Now it is a rule of evidence that

*Howe v. Hayward, 108 Mass. 54; Noakes v. Morey, 30 Ind. 103; Krohn v. Bantz, 68 Ind. 277.

**Ely v. Ormsby, 12 Barb. 570; Teed v. Teed, 44 Barb. 96; 68 Ind. 277.

***Gault v. Brown, 48 N. H. 189; Davis v. Moore, 13 Me. 424; In New York, and perhaps some other States, the statute requires the payment to be made at the time, or the original contract to be renewed at the time of payment. Hunter v. Wetsell, 57 N. Y. 375; Jackson v. Tupper, 30 Hun, 220.

whenever a contract is put in writing, the writing must be produced as the best evidence of the contract. The writing contains within itself the bargain and it makes no difference whether the price was for more or less than ten pounds or \$50, the rule of evidence requires the writing as the best and only evidence, if it be in existence. This existence of a note or memorandum, as required by the Statute of Frauds, presupposes an antecedent contract by parol of which the writing is a memorandum.* The Statute of Frauds does not interfere with the rules of evidence, nor does it change the law, but simply provides that sales of goods above the value of ten pounds may be valid if the memorandum is made and signed as required.**

Sec. 1079. SAME SUBJECT—WHAT MAY BE SHOWN BY PAROL EVIDENCE.—It easily follows from the theory that the note or memorandum presupposes an antecedent oral contract:—

1. That it may be shown by parol evidence that a writing that purports to be a note or memorandum of the bargain, is not a note or memorandum of any antecedent parol contract at all. But there is some question as to how far parol evidence is admissible in such cases.***

2. Parol evidence is admissible for the purpose of

*Benj. Sales, Sec. 201-4; 97 Mass. 41; 73 Me. 186.

**Sievewright v. Archibald, 17 Q. B. 104; Ford v. Yates, 2 M. & G. 549; Lockett v. Nicklin, 2 Ex. 93.

***Pym v. Campbell, 6 E. & B. 370; Jervis v. Berridge, 8 Ch. App. 360; 78 Pa. St. 469; 51 Wis. 303; 92 Mass. 104; 40 Mich. 84.

showing that the written paper is not a note or memorandum of an antecedent parol agreement, but only a part of it. (Benj. Sales, Sec. 209.)

3. So far as the party who sets up the writing as valid for the purpose of binding the other party, is concerned, he cannot supplement the writing by oral evidence of terms or stipulations not contained in it, since this is an admission that the writing is only a part of the bargain.*

4. Whatever is necessarily implied from the contract, although not expressed, the law will supply.

5. The note or memorandum may be contained in two different writings, and it is competent to show by parol evidence that the two writings constitute one contract, or that they refer to the same matter.**

6. When an agreement to do something is not expressed on the face of the agreement signed, but is included in some other writing, oral evidence may be introduced to show what that writing is, so that the two taken together may constitute a contract within the Statute of Frauds. It is also said that when the bargain is to be made out of separate written papers, oral evidence is not allowed to connect them, but they must be either physically attached together to show that they constitute but one instrument, or must be

*Boydell v. Drummond, 11 East, 142; 13 M. & W. 743; 66 Ind. 474; 43 Ia. 146; 70 Me. 202; 92 U. S. 412; 30 Vt. 616.

**Ridgeway v. Wharton, 6 H. L. C. 238; 2 Col. 639; 9 Ia. 344; 19 Up. Can. C. P. 416; contra, Hinde v. Whitehouse, 7 East, 558.

connected by reference in the contents of one to the contents in another*

7. Oral evidence is admissible for the purpose of identifying the subject matter to which the writing refers. As to explain what was meant by the expression "Your wool." (*McDonald v. Longbottom*, 28 L. J. Q. B. 293.)

To aid in determining whether this note or memorandum is satisfactory, the facts and circumstances that were before the parties at the time of negotiating may be shown. Thus it may be shown that samples were before the parties, and if the writing identified the articles oral evidence is not necessary and would not be admitted. But the authorities are not in harmony on this point.

If the contract is within the Statute of Frauds, it is asserted that it cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. While the general rule with reference to contracts generally, is that they may be waived, modified or annulled by subsequent agreements, although the agreement is by parol. But contracts within the Statute of Frauds cannot be thus changed.**

**Peirce v. Corf*, L. R. 9 Q. B. 210; *Rishton v. Whatmore*, 8 Ch. D. 467; 24 Pa. St. 35; 14 N. Y. 584; 52 Ill. 405; 50 Ind. 145.

***Moore v. Campbell*, 10 Ex. 323; *Marshall v. Lynn*, 6 M. & W. 116; 76 U. S. 254; 25 Me. 450; 124 Mass. 19; 28 O. St. 100; 45 Wis. 36; 28 Pa. St. 426; 44 Md. 396; 48 N. Y. 84.

Sec. 1080. WHAT IS A NOTE OR MEMORANDUM IN WRITING.—As to the time when the memorandum or note is to be made, it may be premised that it must be made and signed before the action is brought. That is, there must be a good contract then in existence, it could not be aided afterwards. It is then a matter of evidence not of contract. But it appears that the whole of the terms of the contract need not be agreed to at one time; nor be written down at one time, nor on one piece of paper. Where the memorandum of the bargain is contained in several pieces of paper, these form the memorandum required, provided the contents of the paper signed makes such reference to the other papers, as to make the whole constitute the bargain. It is an open question as to how far you may introduce oral evidence to show that they constitute one bargain. The authorities now say that it is not necessary that the signed papers shall refer to the unsigned papers, if it appears from the instrument that some document is referred to, the document may be identified by parol evidence. So if the papers seem to identify themselves you may show that they were one whole. When such a note or memorandum is on separate pieces of paper, these papers must be consistent and not contradictory.*

It is held that the note or memorandum need not be addressed to or passed between the parties, but may

*Bird v. Munroe, 66 Me. 347; Argus Co. v. Mayor of Albany, 55 N. Y. 495; Lerner v. Wannemacher, 9 Allen, 412; 23 Mo. App. 301; 136 U. S. 83; 22 Ohio St. 62; 38 Neb. 512; 14 N. Y. 584; 53 Me. 20.

be addressed to a third person. Thus if A and B make a bargain, and B writes to a friend stating the terms of the contract it is a sufficient memorandum.*

Sec. 1081. SAME SUBJECT—WHAT IS A SUFFICIENT MEMORANDUM.—The paper having been put in evidence before the jury to constitute a memorandum, the question is whether the contents of the writing or writings so proven constitute a sufficient note of the bargain. The memorandum must show who the parties are, the person to be charged, and the person in whose favor the charge is asserted. The statute expressly requires that the name of the party to be charged must be signed. It is held that the party who signs, the other not signing, cannot bring an action, but that the one not signing can sue.**

The general rule is that the memorandum required by the statute must contain all the essential terms of the contract expressed with such a degree of certainty as to render it unnecessary to resort to oral evidence to determine the intention of the parties thereto.***

It is held that a memorandum need not go into de-

*Moore v. Mountcastle, 61 Mo. 424; Peabody v. Speyers, 56 N. Y. 230.

**Grafton v. Cummings, 99 U. S. 100; Anderson v. Harold, 10 Ohio, 399; but abbreviations, if intelligible and complete, are held sufficient, Foot v. Webb, 59 Barb. 38; 14 How. 446; 82 Ill. 311; 73 Me. 186.

***Stone v. Browning, 68 N. Y. 598; Nichols v. Johnson, 10 Conn. 198; 78 Ill. 607; 44 Ind. 1. This perhaps does not require that the consideration be expressed in all the States, unless the statutes expressly require it. Rigby v. Norwood, 34 Ala. 129; Stimson's Am. Statute Law, Sec. 4142.

tails of all the particulars of the contract, but that it is sufficient if it contains the substance. Where credit is given the terms must be stated if agreed on, and if the time of performance is settled it should be stated in the memorandum.*

A mere notification by telegram of the acceptance of a previous provisional contract of purchase, will not be a sufficient memorandum to take the case out of the statute. (35 Mich. 434; 32 Mich. 274.) That is, although the telegram accepting the contract which had been entered into by parol would be sufficient to make a contract generally except for the Statute of Frauds, it is not sufficient to make a contract valid and take it out of the Statute. (20 Mich. 353.)

If there is no actual agreement as to price, the note or memorandum is sufficient if silent upon that point.** It is not for the reason that the law implies into the bargain the promise to pay a reasonable price. But where the price is fixed by mutual consent it should form part of the memorandum, and the jury would be instructed that it was necessary, otherwise if no price had been fixed.***

*43 Me. 158; 54 Mass. 388; 20 Pa. St. 380; 27 Vt. 167; 61 Mich. 505. In the last case the memorandum of sale was, A bought of B for C three hundred cases of B. M. corn at \$1.25 cash, less one-half per cent." This was held sufficient if the alleged agent was authorized to act for the party. The contract was signed by one party and the action was brought against him.

**Ide v. Stanton, 15 Vt. 685; Phelps v. Stillings, 60 N. H. 505.

***Hanson v. Marsh, 40 Minn. 3; James v. Muir, 33 Mich. 224; contra, Armsby Co. v. Eckerly, 42 Mo. App. 306.

As to the signing, the statute requires the writing to be signed by the party to be charged. The signature would seem to be the signature of the party against whom the contract is to be enforced; that is, it is good or not at the election of the party who has not signed.* But it is sometimes held that there can be no bargain unless it is binding upon both parties.**

The question arises, what is a signature? It means the name of the party in his own handwriting? But the signature need not be the actual name, if the party makes a mark or signs his initials it is sufficient.*** So signing a fictitious name or character will be sufficient.****

In general the location of the signature is not important, thus the signed name might appear at the top, bottom or in the middle of the instrument and yet be valid;***** except that in some jurisdictions where the statute uses the word "subscribed" instead of signed, and this word is given such emphasis of con-

*Justice v. Lang, 42 N. Y. 493; Williams v. Robinson, 73 Me. 186; Lober v. Connit, 36 Wis. 176; Cunningham v. Williams, 43; Mo. App. 631; 68 Ind. 275.

**Wilkinson v. Heavenrich, 58 Mich. 574.

***Sanborn v. Flagler, 9 Allen 474; Bickley v. Keenan, 60 Ala. 293.

****Augur v. Couture, 68 Me. 427; Brown v. Butchers Bank, 6 Hill, 443. The signature may be in pencil or by stamp. Merritt v. Clason, 12 Johns. 102; Brayley v. Kelley, 25 Minn. 160.

*****Hawkins v. Chace, 19 Pick. 502; Drury v. Young, 58 Md. 546; 165 Mass. 331.

struction that it requires the signature to be at the end of the note.*

As to signing by agent, the statute provides that the note may be signed by the agent duly authorized. Under this it has been held that the agent must be a third person, not the other contracting party.** And that the broker's signed entry in his book constitutes the contract between the parties, and is binding on both.***

There are some decisions in regard to broker's bought and sold notes which we will consider briefly. By a bought note is meant, a written note or memorandum of a sale, delivered by the broker who effects the sale to the vendee. While the sold note is the one given by the broker to the seller stating that the goods therein described have been sold by him. These bought and sold notes do not constitute a contract, but when they state all the terms of the contract they are complete and sufficient evidence to satisfy the Statute of Frauds, even though there be no entry in the broker's book, or if the entry in the book be unsigned. Either the bought or sold note alone will

*Davis v. Shields, 26 Wend. 341; James v. Pateen, 6 N. Y. 9; contra, 117 Cal. 447.

**Sharman v. Brandt, L. R. 6 Q. B. 720; Wilson v. Lewis-ton Mill Co. 150 N. Y. 314.

***Butler v. Thompson, 92 U. S. 412; Newberry v. Wall, 84 N. Y. 576. Auctioneers have also implied authority to act for the parties in making the entry and signing, at the time of the sale. (Horton v. McCarty, 53 Me. 394; McBrayer v. Cohen, 92 Ky. 479; Batchelder v. Libbey, 66 N. H. 175; and so has his clerk in his presence and that of the parties. Harvey v. Stevens, 43 Vt. 653; Price v. Durin, 56 Barb. 647.

satisfy the statute provided no variance is shown between it and the other note, or between it and the signed entry in the book. If one note is offered in evidence the defendant has the right to offer the other, or the signed entry in the book to defeat the paper as a memorandum of the contract. A variance may exist between the bought and sold notes irrespective of the signed entry in the book of the broker. There is a variance if the bought and sold notes agree but the signed entry differs; in such case the entry will generally control, but if the bought and sold notes correspond, and they collectively differ from the entry in the book, it is a question of fact for the jury whether the bought and sold notes constitute evidence of a new contract modifying that which was entered in the book, or whether it is the same contract.

Where there is no signed entry in the broker's book, or other writing controlling the terms of the contract, and there is a variance between the bought and sold notes, there is no valid memorandum of the contract. Where a sale is made by a broker on credit, and the name of the creditor has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has a reasonable time after receiving the sold note to inquire into the responsibility of the buyer, and to withdraw the sale in case he does not approve of it. If the wording of the two notes differ, evidence of mercantile usage is admissible to show the meaning to be the same.*

*Butters v. Glass, 31 Up. Can. Q. B. 379; Canterbury v. Miller, 76 Ill. 355; Bacon v. Eccles, 43 Wis. 241; Remick v. Sandford, 118 Mass. 107.

CHAPTER V.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

Sec. 1082. MEANING OF THIS CHAPTER, WITH DIVISION OF SUBJECT.—Assuming a valid contract of sale to have been formed, the question arises, What is the effect of the contract in passing title to the property? That is, when is the bargain to be considered an actual sale, and when a mere executory agreement, or promise to sell?

The distinction between the two contracts has already been pointed out, and consists in this, that, in the bargain and sale, or actual sale, the thing sold becomes the property of the buyer the moment the contract is concluded, and this is so whether the goods be delivered to the buyer or remain in the custody of the vendor; while in the executory agreement, the thing sold remains the property of the vendor until the contract is executed, that is, carried out as agreed.* This subject becomes important where the goods are lost or destroyed just after the contract, and the question is, who bears the loss? In the first case the buyer loses, and in the second the loss falls upon the vendor as he is still the owner of the goods, the buyer having no right to their possession at common law, but sim-

*Benj. Sales, Sec. 308; *Heilbutt v. Hickson*, L. R. 7 C. P. 438.

ply an action for damages if the agreement to sell is not performed.

Both the actual contract of sale, and the executory agreement are equally valid, so that when disputes arise touching the true nature of the contract, it is obviously a question of fact rather than of law. The contract is what the parties intended to make it. If the intention is clearly expressed in writing, there is not much question, otherwise the surrounding circumstances have considerable to do in arriving at the intention of the parties. In doubtful cases the courts have established rules of construction which operate to determine the class into which the contract shall fall. Thus, if the specific goods to which the bargain is to attach are not agreed on, it is apparent that the parties only contemplate an executory agreement; as where the bargain is to sell ten sheep out of a flock of fifty, and the sheep are not identified or selected at the time, but are to be so selected in the future, it is evident that the ownership of the ten sheep has not changed hands, and would not so long as something remained to be done to identify the particular sheep sold.* While, on the contrary, if the goods bargained for are specific, as if there be but ten sheep in the flock and all are sold, and they are ready for delivery, the contract is an actual sale and passes a present title to the sheep. But in this case something may remain to be done to specified goods by the vendor to put them in a

*Heilbutt v. Hickson, L. R. 7 C. P. 438; Stephens v. Santee, 49 N. Y. 35; Clayton v. Seabold, 35 Mich. 168.

deliverable state, or ascertain the price, and then, as a rule, the contract is only executory until these things have been done. It is the intention of the parties that is to control, and all rules yield to their intention when specific, but when the intention has to be determined by construction the rules apply.*

The cases and rules of construction evolved may be considered under the five heads:—

1. Where the sale is of a specific chattel unconditionally.
2. Where the chattels are specific but are sold conditionally.
3. Where the chattels are not specific.
4. Where there is a subsequent appropriation of specific chattels to an executory agreement.
5. Where the *jus disponendi* is reserved.

Sec. 1083. WHERE THE SALE IS OF A SPECIFIC CHATTEL UNCONDITIONALLY.—Where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately. Thus if you go into a store and buy a hat, and bargain for it at \$5.00, it is your hat as soon as the bargain is made, but you cannot take it away until payment is made. That is, every sale is for cash, unless otherwise specified, and the vendor has the right to hold the goods until payment

*Bethel Steam Mill Co. v. Brown, 57 Me. 18; Riddle v. Varnum, 20 Pick. 283; Chapman v. Shepard, 39 Conn. 413; Dyer v. Libbey, 61 Me. 45; Wigton v. Bowley, 130 Mass. 254; Kent Iron Co. v. Norbeck, 150 Pa. St. 559; Hatch v. Oil Co. 100 U. S. 131; Russell v. Abbott, 91 Ga. 178.

is made. It will be observed that if the property is specific, delivery is not regarded as essential to pass title. (This is aside from any considerations as to the Statute of Frauds, we are assuming the contract to be otherwise valid.) The very appropriation of the chattel is equivalent to delivery by the vendor, and the appropriation is made by the selection and the assent of the vendee to take the specific article and pay the price, this being equivalent to possession so far as the passing of the title is concerned.*

Sec. 1084. 2. CHATTELS SPECIFIC, BUT SALE CONDITIONAL.—Where the chattels or things bargained for are specific but are sold conditionally, or where something remains to be done upon

*The common law rules are laid down in Sheperd's Touchstone, (p. 224) as follows: "If one sell me his horse or any other thing for money or other valuable consideration, and, First, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or, Secondly, all; or, Thirdly, part of the money is paid in hand; or, Fourthly, I give earnest money, albeit it be but a penny, to the seller; or Lastly, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment—in all these cases there is a good bargain and sale of the thing to alter the property thereof. In the first case, I may have an action for the thing, and the seller for his money; in the second case, I may sue for and recover the thing bought; in the third, I may sue for the thing bought, and the seller for the residue of the money; in the fourth case, where earnest is given, we may have reciprocal remedies, one against another; and in the last case, the seller may sue for his money." See Noy's Maxims, pp. 87-89; 53 Mich. 444; Dixon v. Yates, 5 B. & Ad. 313, 340; Simmons v. Swift, 5 B. & C. 862; Martin-dale v. Smith, 1 Q. B. 389; Seath v. Moore, 11 App. Cas. 370.

the property before delivery, Lord Blackburn enunciates two rules, as follows:—

First.—Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state into which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.

Secondly.—Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.*

To these rules has been added a third one, as follows: "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."**

*Blackburn on Sale, pp. 151-2.

**Benj. Sales, Sec. 320, and cases cited; *Logan v. Mesurier*, 6 Moo. P. C. 116; *Castle v. Playford*, L. R. 5 Ex. 165; *Foster v. Ropes*, 111 Mass. 10; *Groff v. Belche*, 62 Mo. 400; *Jennings v. West*, 40 Kan. 373; *Prescott v. Locke*, 51

The property in the goods may pass although something remains to be done by the vendor after delivery to the vendee. So where the custom of trade allows the goods to lie at the wharf for a time, and the vendor is held to pay the rent for that time, yet the title might pass immediately to the vendee.* So also, where the vendor was to pay warehouse rent for two months, and while the goods were lying there they were seized by the warehouseman for rent due; and this is likewise the case where a watch, clock, or other article is to be kept in repair for a certain time after delivery by the vendor.**

There has been doubt expressed whether the general rule could be made to extend to the cases where something remained to be done to the goods, not by the seller but by the buyer. The effect does not seem to be the same in obstructing the passing of title.*** In some cases it is held that if an act remains to be done, it must be an act to be performed by the seller and not the buyer, or title passes.**** But this limitation is generally repudiated.

N. H. 94; *Blackwood v. Cutting Packing Co.* 76 Cal. 212; *Smith v. Sparkman*, 55 Miss. 649; *Elgee Cotton Cases*, 22 Wall. 180; *Davis v. Hill*, 3. N. H. 382; *Hamilton v. Gordon*, 22 Oreg. 557.

**Hammond v. Anderson*, 1 B. & P. N. R. 69; *Greaves v. Hepke*, 2 B. & Ald. 131; *Mt. Hope Iron Co. v. Buffington*, 103 Mass. 62; *Underhill v. Boom Co.* 40 Mich. 660.

**102 Mass. 443; 28 Vt. 153; 57 Me. 9; *Olyphant v. Baker*, 5 Denio, 379.

***54 Ia. 512; 71 N. Y. 291.

****30 Mass. 183; 6 B & C. 360.

As to the third rule, given in addition to Lord Blackburn's rules, that title does not pass if there is any unperformed condition precedent, or concurrent, it was held in *Brandt v. Bowlby*, (2 B. & Ad. 932), where iron was delivered under a contract which stipulated that certain bills of plaintiff then outstanding were to be taken out of circulation, there was a partial delivery of the iron, and the defendant failed to comply with the condition as to the bills of plaintiff, plaintiff stopped delivery and brought an action in trover for what he had delivered. The jury found that the delivery of the iron and the redelivery of the bills was to be at the same time, and that the delivery of the iron was a conditional delivery so that trover could be maintained. So it has been held that if a tradesman sold goods to be paid for on delivery and a servant delivered them without payment he may bring trover against the purchaser and retake the goods. So a refusal to accept bills for the price, where this was agreed, was a condition concurrent which prevented the property in the cargo ordered from passing to the buyer.*

Where goods are sent out on an order, with the understanding that they are to be approved before buying, the title does not pass out of the vendor. (*Cushman v. Holyoke*, 34 Me. 289.)

Payment by Installments. Contracts of sale are now frequently made where the agreement is that the title

**Shepherd v. Harrison*, L. R. 4 Q. B. 196; *Barrow v. Coles*, 3 Camp. 92; *Bishop v. Shillito*, 2 B. & Ald. 329.

shall remain in the vendor until payment is made. In America the prevailing rule is, that, in the sale or manufacture of things to be paid for in installments, or as the work of manufacture progresses, the title does not pass as fast as the installments are paid, but only when they are all fully paid, unless the facts and circumstances show that a different intention existed. Such contracts are now made with reference to pianos, sewing machines and a variety of articles sold on the installment plan. These are considered executory contracts of sale, and no title passes to the vendee until the full price is paid. Many courts holding that the partial payments made by the vendee are forfeited by breach of the contract, or default in paying the whole amount. This has been remedied by statute in some States, which require the vendor to repay at least half of the money received from the purchaser before retaking the property sold.*

And some courts allow the seller, if he insists upon taking advantage of default after receiving partial payment, to retain only so much as will compensate him. The compensation probably being a fair rental value of the article for the time it was in the control of the buyer.** Where the seller permits the buyer to keep the property, and takes payment from him after de-

*Rev. Stat. Ohio, Sec. 4152; *Clarkson v. Stevens*, 106 U. S. 505; *Elliot v. Edwards*, 35 N. J. L. 265; *Lang's Appeal*, 81 Pa. St. 18; 85 Ill. 331; 35 Kans. 492; 67 Me. 428; 128 Mass. 470; *Sage v. Sleutz*, 23 O. St. 1; 25 Kans. 492; 128 Mass. 470.

***Johnston v. Whittemore*, 27 Mich. 470; *Ketchum v. Brennan*, 53 Miss. 596; *Hays v. Jordan*, 85 Ga. 750.

fault, the buyer is enabled to become the owner by making a tender of the remainder due.*

*French v. Row, 77 Hun, 380; Hutchings v. Munger, 41 N. Y. 155; Cunningham v. Hedge, 12 App. Div. (N. Y.) 212, and the right continues until demand for payment by the vendor and refusal by the vendee. But a note given for partial payments could not afterwards be collected by the payee if he had retaken the property for failure of some subsequent payment; the consideration of the note fails. Hine v. Roberts, 48 Conn. 267; Bank v. Armstrong, 25 Minn. 530; Loomis v. Bragg, 50 Conn. 228. The vendor may retake the property in case of default, or sue upon the notes to recover the contract price; he cannot do both. Aultman v. Fletcher, 110 Ala. 452. So if he has received part payment and filed claim for the balance against the buyer's estate, he has made his election and cannot retake the goods. Holt Mfg. Co. v. Ewing, 109 Cal. 353. And see the valuable article on this subject as to prepayment of price in the Notes to Benj. Sales, (Bennett's 7th ed.) pp. 298 to 312, where the law in the various States is thus summarized:

First. All agree that in simple bailments, or leases with a right to buy on paying a stated price, the bailee or lessee does not acquire by the delivery any power to transfer a title to *bona fide* purchasers or attaching creditors before payment of the price. Citing, Ballard v. Burgett, 40 N. Y. 314; Chamberlain v. Smith, 44 Pa. St. 431; 63 Ind. 325; Wentworth v. Wood Machine Co., 163 Mass. 32.

The vast majority apply the same rules to actual sales and delivery when the title is expressly reserved in the vendor until payment of the price.

Third. Most hold that, in case of attempted sales by such conditional purchasers, the vendor, if not paid according to the terms of the contract, may then bring trover against the sub-vendee, without any prior demand or notice of the condition, or of its non-performance.

Fourth. In such action the vendor may recover the full value of the property without any deduction for partial payments by the first vendee made before the second sale.

Fifth. All agree that such conditional sales are valid be-

Sec. 1085. WHERE THE CHATTELS ARE NOT SPECIFIC.—Where the contract is for the sale of a thing or chattel not specific, the contract is an executory agreement and the title in the thing does not pass.* This class of cases may be arranged under two heads:

First. Where something remains to be done by the vendor, as, for example, to manufacture the article.

Second. Where the bargain is for a certain quantity out of a larger quantity. In this case the power of appropriation generally remains with the vendor, and he can deliver as he sees fit, provided he conforms to the terms of the contract as to time, quality, etc.**

1. As to manufactured articles there is some dispute as to when the title passes. It being held in some cases, that completion of the article and notice to the vendee is sufficient to pass title. Others seem to hold that the article must be finished and delivered, or ready for delivery, and approved by the purchaser; in other words, accepted by the purchaser.***

So where there is a general sale of goods already on

tween the parties, and that the vendor may retake the property from his vendee on non-performance of the condition.

*Wallace v. Breeds, 13 East, 522; White v. Wilks, 5 Taunt. 176, which was a sale of 20 tons of oil out of the vendor's stock in his cisterns; Gillett v. Hill, 2 Cr. & M. 530; Bank v. Crowley, 24 Mich. 492; Fordice v. Gibson, 129 Ind. 7.

**Gillett v. Hill, 2 Cr. & M. 530; Gabarron v. Kreeft, L. R. 10 Ex. 274.

***Higgins v. Murray, 4 Hun, 565; Goddard v. Binney, 115 Mass. 450.

hand in stock, or to be procured by the vendor, the mere acceptance of an order, and charging the goods on his books by a merchant, will not pass title in any particular goods to the buyer until they have been set apart, marked, or in some way appropriated and designated as for the buyer. And this is true though the order covers the whole quantity on hand by the vendor.*

2. Where the bargain is to sell a portion of a larger quantity of the same kind, as to sell ten tons out of a hundred, five gallons out of fifty, "100 bushels out of that bin," when the bin contains a thousand bushels, the authorities are in conflict as to whether or not some separation, designation or identification is necessary in order to pass the property in any portion of the whole. The weight of authority seems to be with the English rule that there must be a specific identification of the goods sold in order to pass the title in such cases.**

*Ormsbee v. Machir, 20 Ohio St. 295; Winslow v. Leonard, 24 Pa. St. 14; Bancher v. Warren, 33 N. H. 183; Lewis v. Lofley, 60 Ga. 559.

**Brewer v. Smith, 3 Greenl. 44; Young v. Austin, 6 Pick. 280; Woods v. McGee, 7 Ohio, 467; Scudder v. Worsted, 11 Cush. 573; McLaughlin v. Piatti, 27 Cal. 463; Bailey v. Smith, 43 N. H. 141; Keeler v. Goodwin, 111 Mass. 490; Bank v. Gillette, 90 Ind. 268; Huntington v. Chisholm, 61 Ga. 270. And see the valuable note on this subject in Benj. Sales, (7th ed.) pp. 321-328, with the following conclusions:

1. In the sale of a portion of the larger mass, the whole remaining in the possession of the vendor, with a right and power in him to make a separation, both upon principle and the weight of authority, no title passes until that is done, so as to enable the vendor to recover the price, even for goods

In this country there is an important exception to this general rule, which is applied in the case of products stored in an elevator, and which are known as "elevator cases." Where the grain belonging to various individuals is stored as a mass in one bin, the owners become tenants in common of the grain, by established usage, to which each is deemed to have assented, and own respective portions of the whole, but no one of them owns any particular grain. Grain thus stored is sold by the usage of trade, by giving the vendee an order on the warehouseman, and the vendee may then take a receipt for the amount purchased and leave it

"bargained and sold." *Approved in New England Co. v. Standard Worsted Co.* 165 Mass. 328.

2. Nor to enable the vendee to maintain trespass, trover or replevin against the vendor, or any one wrongfully taking away the goods from the vendor's possession.

3. If the vendee has paid the price, and the vendor refuses to separate or set apart the portion sold, the vendee may recover back the amount paid; if not paid, damages for non-fulfillment.

4. In case the whole mass is delivered to the vendee, with a right and power in him to make the separation, the title sufficiently passes to render him liable for the price, or enable him to sue anyone for the wrongful conversion of the goods, even before he has separated them.

5. A constructive delivery may be sufficient for this purpose, as where a bailee of the goods agrees to hold them on the order of the vendor, for the benefit of the vendee.

Cases holding to the contrary of the general rule, are: *Crofoot v. Bennett*, 2 N. Y. 258; *Damon v. Osborn*, 1 Pick. 476; *Carpenter v. Graham*, 42 Mich. 191; *Lamprey v. Sargent*, 58 N. H. 241; *Sanger v. Waterbury*, 116 N. Y. 371, in this case the bags sold had marks on them which served to distinguish them from the mass.

still in the warehouse, and thereby become the owner of so much of the grain. This is not like the sale of property where specific articles are to be selected from a larger mass. The transaction is upon paper, and there is no necessity of weighing, measuring or separating the part sold. The usages of trade have made the possession of the warehouse receipt for the grain equivalent to possession of the property. The transfer of these receipts transfers the property. It is not merely a contract of sale, or executory agreement, but an actual sale.* It is said that much the same result is produced by the transfer of a bill of lading.

Sec. 1086. SUBSEQUENT APPROPRIATION OF SPECIFIC CHATTELS TO AN EXECUTORY AGREEMENT.—There being no appropriation of the articles sold to the buyer at the time of sale, no title passes, but this executory contract may be converted into a completed sale by specifying the goods to which the contract shall attach, or by the appropriation of specific goods to the contract. The sole element wanting to complete the contract is thus supplied. And while the contract has thus been made in two successive stages, yet it is one contract, to wit, a bargain and sale of goods. The selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes.**

*Cushing v. Breed, 14 Allen, 380; Morrison v. Woodley, 84 Ill. 192; 48 Mich. 118; Inglebright v. Hammond, 19 Ohio, 337. These cases are controlled by statutes in some States.

**Rhode v. Thwaites, 6 B. & C. 388.

The only difficulty is where the vendor only has made a subsequent appropriation. There is no difficulty if the vendee is, by express or implied contract, entitled to make the selection. If the vendor is to select the articles, the question arises as to when the title passes. That is, when has the vendor so far appropriated the goods, as to be no longer at liberty to change his intention? His act in simply selecting such goods as he intends to send the buyer is not enough, since he might lay them aside in his warehouse, and then change his mind, or sell them to another, as they do not yet belong to the first purchaser. It is a question of law whether the selection is a mere wish, or a determination and expression of his intention which he cannot revoke.*

The rule of election with its complement, as laid down by Lord Blackburn, is as follows :

When from the nature of the agreement, an election or selection is to be made, the party who is by that agreement to do the first act, has authority to make the choice, in order that he may be able to do that first act, and when he has once done that act, the election has then been irrevocably determined, but till then he may change his mind. Thus A sells to B, one thousand bricks, out of a larger quantity ; B is to send his cart and get them. In this case B is to do the first act, and may make the choice. After the bricks are in the cart he cannot change his mind. While if A were

*Benj. Sales, Sec. 358.

to load them into B's cart, A's election would be when that was done and not before.*

As a complement to the foregoing rule, when the vendor has to dispatch the goods or do anything with them, until the goods are appropriated he has a right to change his mind, or choose as he may see fit, and the property passes the moment the dispatch or other act has commenced. Preparation for performing the act is not sufficient, it must be actually commenced.**

It has long been settled law that, where a vendor delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the vendee, and the property vests in the vendee at once.***

The vendor cannot make the selection otherwise than in conformity with the terms of the contract. He cannot send a larger quantity and pass title to even the quantity ordered, nor can he send a larger quantity and leave the selection to the purchaser. The purchaser would not be liable for the price unless he accepted in such a case.****

*Blackburn on Sale, 128; Heyward's Case, 2 Co. 36.

**Blackburn on Sale, 128; Aldridge v. Johnson, 7 E. & B. 885.

***Dutton v. Solomanson, 3 B. & P. 582; Pacific Iron Works v. Railroad Co., 62 N. Y. 272; Krulder v. Ellison, 47 N. Y. 36; Odell v. Railroad Co., 109 Mass. 50; Swanke v. McCarty, 81 Wis. 109; Carriage Co. v. Lusk, 11 Tex. App. 493; Falvey v. Richmond, 87 Ga. 99.

****Barton v. Kane, 17 Wis. 38; Downs v. Marsh, 29 Conn. 409; Larkin v. Lumber Co., 42 Mich. 296; 62 N. Y. 151; Rommel v. Wingate, 103 Mass. 327. So if the goods are materially different from those ordered, no title passes, 98 Mass. 517.

Sec. 1087. WHERE THE *jus disponendi* IS RESERVED.—There may be cases where, although the vendor has unquestionably appropriated the goods, yet he has reserved expressly, or by implication, the ownership. In such cases the rules of construction heretofore considered give place to the actual and apparent intention of the seller. The rules so far considered as to the passing of title are rules of construction, and are only important when the contract is doubtful in its intention, and such rules cannot be applied where the parties do acts repelling the presumptions on which the rules are founded. So, however complete may be the appropriation by the vendor, the property will not pass, if by other acts he shows a clear intention to retain the ownership of the goods appropriated.

Such questions generally arise where the parties live apart, and the vendor is desirous of securing himself against the vendee's failure to pay the purchase price, through insolvency or otherwise. Thus if A in New York, orders goods of B in Liverpool, there are two methods by which B may fill the order without assuming the risk of A's not paying for the goods on arrival in New York. These are:—

1. B may make a bill of lading payable to his own order, or to his agent if he has one in New York, the goods to be paid for before delivery of the bill to A. This act shows that though he appropriated the goods according to the order, yet he did not intend to part with the title.

2. Or B may make a draft on A for the price of the

goods with a bill of lading attached, and transfer these to a bank in New York with instructions to be delivered to A on his paying the amount of the draft, that is, the price of the goods. This method of sale also repels the idea that B intended to transfer the title in the goods sent until payment.*

The rules which seem to have been established in this regard are:—

1. Goods delivered by a vendor to a carrier for delivery to the buyer in pursuance of an order of the buyer, are considered as delivered to the buyer; the carrier becoming the agent of the vendee, and delivery to an agent is delivery to the principal.**

2. Goods delivered on board a vessel to be carried, and a bill of lading taken, is not considered as a delivery to the buyer, but constitutes a delivery to the captain as bailee for the person indicated in the bill of lading.***

3. If the bill of lading is taken in the name of the vendor, this is decisive to show that his intention not to pass title to the vendee, but to retain the *jus disponendi* of the goods. This inference that the vendor retains

*Benj. Sales, Sec. 382; *Van Casteel v. Booker*, 2 Ex. 691; *Jenkyns v. Brown*, 14 Q. B. 496; *Walley v. Montgomery*, 3 East, 585; *Emery v. Bank*, 25 Ohio St. 360; *Bank v. Logan*, 74 N. Y. 568; *Bank v. Bangs*, 102 Mass. 291; 111 Mass. 163; *Bergman v. R. R. Co.*, 104 Mo. 77; *Berger v. State*, 50 Ark. 20

**L. R. 7 H. L. 269; *Wait v. Baker*, 2 Ex. 1; *Stafford v. Walter*, 67 Ill. 83.

****Wait v. Baker*, 2 Ex. 1; L. R. 4 G B. 196; 19 C. B. N. S. 290.

the right of disposal may be rebutted by proof that in so doing he acted as agent for the vendee and did not intend to retain control of the property.*

4. As a general rule the delivery of goods by the vendor on board the purchaser's own ship is a delivery to the purchaser, and passes the property. Yet the vendor may, by special terms, restrict the delivery and retain the title.**

5. If a bill of exchange for the price of the goods is enclosed to the buyer for acceptance, together with the bill of lading, without the intervention of bank or intermediate agent, the buyer cannot retain the bill of lading without accepting the bill of exchange also.***

6. A bill of lading addressed to the buyer and making the goods deliverable to buyer's order, vests the title unconditionally in the buyer, though the seller may have intended the transfer to have been conditional on the acceptance of the bill of exchange. (Benj. Sales, Sec. 399.)

7. The bill of lading having been reserved only to secure the price, the property vests in the buyer upon payment or tender of the contract price. (Mirabita v. Bank, 3 Ex. Div. 164.)

8. Generally when goods are shipped C. O. D., the buyer to pay the freight, the reservation on the part of

*Wilmhurst v. Bowker, M. & G. 792; 2 Ex. 691; 14 Q. B. 496; Browne v. Hare, 4 H. & N. 822.

**Turner v. Dock Trustees, 6 Ex. 543; L. R. 10 Ex. 274.

***Shepherd v. Harrison, L. R. 4 Q. B. 196; Ogg v. Shuter, 1 C. P. Div. 47.

the seller is of the possession to secure the payment, rather than the title; and the title is held to pass at the time and place of sale, so that the loss in transit would fall upon the buyer. But the buyer has no right to the goods until he does pay the price, and could not maintain replevin against the carrier for refusal to deliver without payment.* Other cases hold that the sale is executory until the price is paid to the carrier, and the title does not vest until that time.**

*Commonwealth v. Fleming, 130 Pa. St. 138; Higgins v. Murray, 73 N. Y. 252; Pilgreen v. State, 71 Ala. 368; Lane v. Chadwick, 146 Mass. 68.

**State v. O'Neil, 58 Vt. 140; People v. Shriver, 31 Albany L. J. 163.

CHAPTER VI.

CONDITIONS IN SALES.

Sec. 1088. GENERAL PRINCIPLES AND DEFINITIONS.—The rules of law governing conditions in contracts are said to be subtle and perplexing. In setting up a special count on a contract of sale the pleader has to determine whether a promise made or an obligation assumed by a party to the contract is dependent on, or independent of, the promise made by the other; whether it be a condition to be performed before or concurrently with the demand on the other party for compliance with his promise; or whether it may be neglected without affecting the right to sue the other party, and only allow him a cross-action for the failure to perform it. All these and many more questions arise under this subject.*

The subject of representations, warranty, conditions and fraud in contracts are closely connected and often interwoven and the discussion of one frequently involves the others.

A *representation* is defined as “a statement or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it.”** It is not an integral part of the contract, though included in the written instrument; it may be untrue and the contract remain unbroken, and,

*Benj. Sales, Sec. 560.

**Benj. Sales, Sec. 561.

unless made fraudulently its untruth would not give rise to a cause of action. To constitute an untrue representation a fraud, it must appear that it was made with a knowledge of its untruth, or in reckless disregard or ignorance whether it was true or false.* When the representation is in writing, and the question arises whether or not it is part of the contract, the matter is one of law and not of fact, the court and not the jury decides the question. If it is determined that the representation is a substantial part of the contract, then a more difficult question arises, is it a *condition precedent*? or is it an independent agreement? a breach of which will not justify a repudiation of the contract, but only a counterclaim for damages.**

The rule laid down by Lord Mansfield to determine whether a representation or statement is a condition or not is as follows: "the dependence or independence of

*Elliott v. Von Glehn, 13 Q. B. 632; Weir v. Bell, 3 Ex. D. 238.

**Glaholm v. Hays, 2 M. & G. 257; Clipsham v. Vertue, 5 Q. B. 265; 47 N. Y. 62; 54 N. Y. 167. Thus a statement that a vessel will sail or be ready to receive cargo on a certain day is held to be a condition, while a stipulation that the vessel will sail with all convenient speed, or within a reasonable time, is held to be an independent agreement. In the New York cases, the seller in one case was excused from damages for non-delivery of part of 607 bales of cotton by its accidental destruction during delivery, it being unpaid for, while in the other case he was held liable for a failure to deliver all of a purchase of logs which had been paid for, though the failure was caused by a sudden freshet over which the seller had no control. So failure to make "prompt shipment" by reason of being blocked by ice, was held no excuse in 105 N. Y. 404.

covenants is to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance."* And the rules for discovering the intention are stated to be mainly these:

1. Where a day is appointed for doing any act, and the day *is* to happen or *may* happen before the promise by the other party is to be performed, the latter may bring an action before performance, which is not a condition precedent; otherwise, if the day fixed is to happen after the performance, for then the performance is deemed to be a condition precedent.

2. When a covenant or promise goes only to *part* of the consideration, and a breach of it may be paid for in damages, it is an independent covenant, not a condition.

3. Where the mutual promises go to the *whole* consideration on both sides, they are mutual conditions precedent, formerly called dependent conditions.

4. Where each party is to do an act at the same time as the other, as where goods in a sale for cash are to be delivered by the vendor, and the price to be paid by the buyer,—these are concurrent conditions, and neither party can maintain an action for breach of contract without averring that he performed or offered to perform what he himself was bound to do.

* Jones v. Barkley, 2 Doug. 684-691; Bettini v. Gye, 1 Q. B. D. 187.

5. Where from a consideration of the whole instrument it is clear that the one party relied upon his remedy, and not upon the performance of the condition by the other, such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent.*

The application of these rules of construction must have reference to the circumstances surrounding the making of the contract and its evident purpose. Thus a description of a vessel in a charter party as a "French vessel," might be a mere description in times of peace between the nations of the contracting parties, and a vital condition precedent in times of war.**

So a condition precedent which would excuse one party from performing his promise until the other party had complied with it, may, by the acceptance of a substantial part performance of the other's promise, be turned into a *warranty* or *independent agreement*, such that its breach would only constitute a counter-claim for damages in an action by the one performing (*Ellen v. Topp*, 6 Ex. 424).

As a general rule, whatever the condition may be, if it is ascertained to be a condition precedent, it must be performed before the contract will take effect, and to maintain an action it must be averred that it was per-

*Benj. Sales, Sec. 562; *Graves v. Legg*, 9 Ex. 709; *Poussard v. Spiers*, 1 Q. B. D. 410; *Cutter v. Powell*, 2 Sm. L. C. 1; *Roberts v. Brett*, 18 C. B. 561; *Tipton v. Feitner*, 20 N. Y. 423; *Gill v. Wheeler*, 52 Md. 8.

***Behn v. Burness*, 3 B. & S. 751.

formed, or offered to be performed. But the necessity of performing such a condition may be *waived* by the other party, either expressly or by implication from his acts and conduct inconsistent with the expectation of its performance, as where its performance is obstructed or hindered by the *other party*, or such party has in advance refused to carry out his promise, or made it impossible to perform his part.* But the mere assertion that the other party will be unable or refuse to carry out his promise is not sufficient; it must be a distinct, unequivocal and absolute refusal to perform the promise, and be so treated by the party who relies upon it to excuse the going forward with the condition precedent.**

Sec. 1089. SAME SUBJECT—IMPOSSIBILITY OF PERFORMANCE.—It is no excuse for the non-performance of a condition that it is impossible for the obligor to fulfill it, if the performance be in its nature possible; while absolute and inherent impossibility of performance, in its true sense, is always an excuse. Disability is a very different thing from impossibility; if a thing is possible in itself to be done, that is, possible in the nature of things to be done, a positive contract to do it is binding, though some un-

*Hotham v. East India Co., 1 T. R. 645, in which Ashurst J. said, "that if the performance of a condition precedent had been rendered impossible by the neglect or default of the defendant, *it is equal to performance.*"

**Cutter v. Powell, 2 Smith's L. C. 1; Smoot v. United States, 15 Wall. 36, 48.

forseen contingency, accident or calamity may prevent its performance by the promisor.*

Sec. 1090. SAME SUBJECT—SALES DEPENDENT UPON ACTS OF OTHERS, OR SOME CONTINGENT EVENT.—Where the act of a third person is made a condition precedent to the sale, or to the liability for payment, it must be performed, or some excuse given for non-performance. Thus if the condition be that the article shall accomplish a certain result in the opinion of some third per-

*Dexter v. Norton, 47 N. Y. 62; Thomas v. Knowles, 128 Mass. 22; McMillan v. Fox, 90 Wis. 173; Jones v. The United States, 96 U. S. 24; 60 N. Y. 487; Summers v. Hibbard, 153 Ill. 102; Taylor v. Caldwell, 3 B. & S. 826; Co. Litt. 206a. The cases hold that the destruction of vendor's mill, where goods are to be made, though making it impossible to perform the bargain, is not an excuse, otherwise if the contract had been to produce the goods in the *vendor's own mill*. But if a thing be physically impossible, or be rendered impossible by the act of God, the performance of that thing will be excused, as where the contract is to sell a horse to be delivered on a fixed day, and in the interval the horse dies, the death of the specified horse excuses the performance. Shep. Touch. 173, 382; Rugg. v. Minett, 11 East 210; Dexter v. Norton, 47 N. Y. 62. In Rugg v. Minett, *supra*, the rule was laid down thus: "the principle seems to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance." Robinson v. Davidson, L. R. 6 Ex. 269, excusing a lady from playing a piano at a concert because she was too ill to perform her contract; Lorillard v. Clyde, 142 N. Y. 56; Caden v. Farwell, 98 Mass. 137, holding that death of the *promisee* in contract to perform personal service excuses performance. Harrison v. Conlan, 10 Allen, 86.

son, his decision, in the absence of fraud, is final. So the architect's certificate in building contracts, and the affidavit of a justice of the peace or notary in insurance contracts, are enforced strictly in law when made a part of the contract.*

Where the condition upon which the sale depends is the happening of some future event, the question arises as to the duty of the promisee to give notice that the event has happened. The rule is, that if the happening of the event is equally open to the knowledge of both parties, it is not necessary to give notice; both are bound to take notice. While if the event or contingency is peculiarly within the knowledge or information of the plaintiff, he must give notice before the liability of the defendant becomes fixed. Thus where the sale of a commodity was upon the condition that the vendee would pay as much as the seller could get from any one else, and the vendee could not know without notice how much to pay, it was held that the vendor could not bring an action until he had given such notice.**

Sec. 1091. SAME SUBJECT—SALES TO ARRIVE.—A very common contract of sale is the sale of goods "to arrive" or "on arrival." Such a sale is conditional or executory in character. No title passes,

*Robbins v. Clark, 129 Mass. 145; Nofsinger v. Ring, 71 Mo. 149; Kirtland v. Moore, 40 N. J. Eq. 106; Johnson v. Phoenix Ins. Co. 112 Mass. 49; Smith v. Briggs, 3 Denio, 73.

**6 M. & W. 154; Watson v. Walker, 23 N. H. 491; Tasker v. Bartlett, 5 Cush. 364. If the notice is stipulated to be given, this must be done at all events.

as a rule, and no obligation arises on either side, unless the goods arrive.* So the result of the decisions seems to be that goods sold on arrival of a certain ship, or to arrive by a certain ship, the two expressions meaning the same thing, implies the conditions that the ship shall arrive, and the goods sold shall be on board at arrival. The goods which do arrive must be of the kind and quality stipulated for, or the sale is not completed; so if the months in which shipment is to be made is stipulated, or the routes of shipment, these must be complied with, but where goods were to arrive "by the *Christopher*" and arrived by the *St. Christopher*, the buyer was not excused from receiving them.**

The sale of a "cargo" to arrive by a certain ship, means the sale of all that the vessel is capable of carrying, and the buyer is thereby entitled to all she carries, and is not bound to accept less.***

In sales of goods to arrive it is a common condition that the vendor shall give notice of the name of the ship on which the goods are expected, as soon as it becomes known to him. And a strict compliance with this stipulation is held a condition precedent to his right to enforce the contract.****

*Shields v. Pettie, 2 Sandf. 262; 4 N. Y. 122; Rogers v. Woodruff, 23 Ohio St. 632; Clark v. Fye, 121 N. Y. 470.

**Smith v. Pettee, 70 N. Y. 13; Hill v. Blake, 97 N. Y. 215; Neldon v. Smith, 36 N. J. L. 154.

***Barrowman v. Drayton, 2 Ex. Div. 15; Pembroke v. Parsons, 5 Gray, 589; Sugar Refinery v. Castano, 43 Fed. Rep. 279.

****4 Camp. 329; 11 Ex. 642.

Sec. 1092. SAME SUBJECT—CONCURRENT OR MUTUAL CONDITIONS.—In a sale the obligation of the vendor to deliver, and that of the buyer to pay are concurrent conditions in the nature of mutual conditions precedent, so that neither can enforce the contract without showing performance, or offer to perform, on his part. The first step must be taken by the vendor who delivers, or offers to deliver, but he is not bound to deliver if the vendee is not ready to pay. If no place of delivery is stipulated the articles are, if portable, deliverable at the place of sale, and the seller is not in default until the buyer has come and demanded them.*

It is a general rule, established by the weight of authority, that a failure to deliver the first installment of goods according to an entire contract deliverable in installments, unexcused, or unwaived, by the buyer, is a breach of the whole contract and operates to release the buyer from accepting any other installment.** It is not always easy to determine whether time in such contracts is a condition precedent or not. The courts seek to discover what the parties really intended, and if it appears on a fair interpretation of the language and

**Jones v. Marsh*, 22 Vt. 144; *Simmons v. Green*, 35 O. St. 104; *Hanson v. Slaven*, 98 Cal. 377; *Leslie v. Casey*, 59 N. J. L. 6; *Lobdell v. Hopkins*, 5 Cow. 516; *Phelps v. Hubbard*, 51 Vt. 489. If the seller agrees to deliver on a stated day, he should seek the buyer and offer delivery. *Hapgood v. Shaw*, 105 Mass. 276.

***Norrington v. Wright*, 115 U. S. 188; *Catlin v. Tobias*, 26 N. Y. 217; *Lehigh Zinc Co. v. Trotter*, 42 N. J. Eq. 678; *contra*, 65 Ia. 390; 66 Pa. St. 35.

circumstances that time is of the essence of the contract, stipulations in regard to it will be conditions precedent.*

But it does not follow that a failure to pay for one installment, when delivered in accordance with the contract, releases the vendor from delivery of the balance, since prompt payment is not necessarily so important or material to the contract as prompt delivery. So if the refusal to pay for the installment was the result of a misunderstanding, or no time of payment had been stipulated, and is not a clear justification of the inference that he repudiates the entire contract, the vendor is not released from further delivery.**

Sec. 1093. SAME SUBJECT—SALES BY SAMPLE, ON TRIAL, ETC.—If goods are sold by sample it is always an implied condition that the buyer shall have a fair opportunity to compare the bulk with the sample. An improper refusal by the vendor to allow this is a breach of the contract, which justifies the vendee in rejecting the articles, although in fact, they may conform to the sample. (1 B. & C. 1.)

In sales on trial or delivery with a right to buy if one likes, the buyer has a reasonable time for trial, if

*Brown v. Guarantee & Trust Co. 128 U. S. 403; Pope v. Porter, 102 N. Y. 366; Jones v. U. S., 96 U. S. 24; Woodward v. Barton, 113 Mass. 81; contra, Davis v. Emery, 61 Me. 140.

**Mersey Steel Co. v. Naylor, 9 App. Cas. (Eng.) 434; Winchester v. Newton, 2 Allen, 492; Shinn v. Bodine, 66 Pa. St. 182; Palmer v. Breen, 34 Minn. 39; Stephenson v. Cady, 117 Mass. 6; McGrath v. Gegner, 77 Md. 331.

no time has been set; and the risk is in the vendor until such time has elapsed. The question of reasonable time is for the jury to determine.*

So if the trial agreed upon involves the consumption or destruction of what is tried, the jury must determine whether the quantity consumed was more than necessary for the trial, for in such case the sale would become absolute by an implied acceptance. (50 Ala. 329; 117 Mass. 321; 3 M. & W. 170.)

The contract of "sale or return" differs from a sale on trial, as in the sale or return the title passes at once to the buyer, subject to an obligation of the vendor to rebuy within the time stipulated, or within a reasonable time if none has been stated. If the right to return is not exercised, and the property is retained, the sales become absolute. If the buyer resold or pledged the goods it would be inconsistent with the intention to return the goods.**

Where the condition is that the sale shall be satisfactory, as where made to answer some special order, this condition is valid, and if the buyer does not find

**Hunt v. Wyman*, 100 Mass. 198; *Lyons v. Stills*, 97 Tenn. 514; *Hall Machine Co. v. Brown*, 82 Tex. 469; *Kahn v. Klabune*, 50 Wis. 235; *Turner v. Machine Co.*, 97 Mich. 174. There may be an express or implied acceptance, but if the time for trial is specified, the failure to return the goods within the time makes it a sale. So it may be necessary to give the vendor notice of the trial. *Gibson v. Vail*, 53 Vt. 476; *Aiken v. Hyde*, 99 Mass. 183.

***McKinney v. Bradley*, 117 Mass. 321; *Gay v. Dare*, 103 Cal. 454; *Jones v. Wright*, 71 Ill. 61; *Kirkham v. Allenborough*, 1 Q. B. 201; 88 Ia. 607; 53 Kans. 743.

the article satisfactory he need not accept, regardless whether the article in fact conforms to the order and ought to be satisfactory.*

It is held that if one sells an article by a particular description, it is a condition precedent to his right of action, that the thing which he delivers or offers to deliver should conform to the description.** But the American cases usually treat particular words of description as constituting an implied warranty.***

The English rule is exemplified in the sale of stock, notes, bills of exchange and the like, where not by collateral warranty, but by the principal contract itself, it becomes a condition precedent that the vendor must deliver genuine paper, and not false or counterfeit paper.****

*Brown v. Foster, 113 Mass. 136; Gibson v. Cranage, 39 Mich. 49; Gray v. R. R. Co., 11 Hun. 70; Machine Co. v. Chesrown, 33 Minn. 32; Platt v. Broderick, 70 Mich. 580. These cases hold the rule applicable to a sale of a "suit of clothes," a "portrait," a "steamboat," a "harvester," and the like.

**Chanter v. Hopkins, 4 M. & W. 399; Nichol v. Godts, 10 Ex. 191; Allan v. Lake, 18 Q. B. 560.

***Peckham v. Davis, 93 Ala. 474; Gardner v. Lane, 9 Allen, 492.

****Jones v. Ryde, 5 Taunt. 488; Mitchell v. Newhall, 15 M. & W. 487; Lamond v. Davall, 9 Q. B. 1030.

CHAPTER VII.

WARRANTY IN SALES OF PERSONAL PROPERTY.

Sec. 1094. **WARRANTY DEFINED AND EXPLAINED.**—A warranty is a collateral undertaking forming part of the contract, by agreement of the parties, express or implied. It is said to be a collateral undertaking because it forms no essential part of the contract of sale. The sale is no less complete in the absence of warranty; nor do antecedent representations form any part of the bargain. A warranty given after the sale is completed is not supported by the consideration of the sale, and is void unless there is some new consideration. It has also been held, that, though the goods have been delivered, if the price has not been paid, the warranty given at the time of fixing the price will form part of the contract.*

So if the vendee refuses to receive the goods on account of the vendor's refusal to fulfil some obligation incumbent upon him to give a warranty, and it is then given, though the contract was approved before it, the warranty attaches to the contract and is valid.**

*Hillman v. Wilcox, 30 Me. 570; Larey v. Taliaferro, 57 Ga. 443; 100 Mass. 432. See this subject in No. 4 Home Law School Series, under Contracts.

**14 Wis. 258; 62 Ga. 238; 68 Wis. 428. Thus where third persons before purchasing from the original buyer, called upon the seller and asked him if a warranty would follow the goods when they came into their possession, and

It is sometimes difficult to determine whether a statement is merely an expression of opinion, or whether it is a warranty. It must be a statement of fact, and must express or imply a promise to make good such representations as to the merchandise sold as were relied upon by the buyer, if it is to constitute a warranty. It is not necessary in an express warranty to prove any fraud, in an action for the breach, though alleged in the declaration.*

Sec. 1095. WHAT CONSTITUTES AN EXPRESS WARRANTY.—The character of the language used and the character of the property sold, as well as the intention of the parties finally reached, must all be considered in determining what is a warranty. In cases where the alleged warranty was in writing it has been left to the jury to say whether the intention of the parties was that the representations should constitute a warranty or not. In other cases the court determines whether the contract contains an express warranty or not. The well settled propositions as to what constitutes an express warranty are stated to be:—

his affirmation that it would, was held to be upon a sufficient consideration, and a warranty would be supported by it. In Ohio, the court draws the following distinction between *warranty* and *guaranty*: A warranty is an absolute undertaking *in presenti*, as well as *in futuro*. While a guaranty is a collateral warranty, sometimes conditional, against some default or event in the future. 11 Ohio St. 153.

*56 Mich. 447; Dillman v. Nadelhoffer, 119 Ill. 567; Gartner v. Corwine, 57 Ohio St. 246; Shippen v. Bowen, 122 U. S. 575. Contra, 32 Mich. 254; 14 Mich. 108.

1. Neither the word "warrant" nor any other particular word or form of words is necessary.

2. Mere words of praise and commendation, or which merely express the vendor's opinion, belief, judgment, or estimate, do not constitute a warranty.

3. Any positive affirmation of a material fact as a fact, intended by the vendor as and for a warranty, and relied upon as such, is sufficient; and some hold the actual intent to warrant unnecessary.

4. Whether a particular assertion is an affirmation of a positive fact, or only praise and commendation, opinion or judgment, is a question for the jury, where the meaning is ambiguous, and the intention of the parties may be gathered from surrounding circumstances.*

Where the vendor knows the use to which goods are to be put, and warrants them perfect, the warranty is qualified by the use intended.** It is said that the in-

*Benj. Sales, (7th ed.) p. 664; *Horton v. Green*, 66 N. C. 596; *Shippen v. Bowen*, 122 U. S. 575; *Kirchner v. Conrad*, 9 Mont. 191; *Stevens v. Bradley*, 89 Ia. 174; *Figge v. Hill*, 61 Ia. 430; *Kenner v. Harding*, 85 Ill. 268; *Barnes v. Burns*, 81 Wis. 231. In 5 M. & R. 124, the seller after saying that the horse sold was sound to the best of his knowledge, was asked to warrant it, and replied, "I never warrant, I wouldn't warrant myself," it appeared that the horse was unsound and he knew it, and it was held that this was a qualified warranty that the horse was sound to the best of his knowledge. So a warranty that a horse is all right except that he would sometimes shy, is broken by partial blindness in the horse so warranted. 49 Conn. 462; 8 Neb. 218.

**41 Wis. 630; 117 Mass. 523; 28 Conn. 328; 48 Wis. 229. So a warrant is usually limited to the expression used.

terpretation of a written warranty is for the court and of an oral one for the jury.

As to oral warranties, if the bargain is formally in writing, and makes no mention of a warranty, no oral warranty made at the same time or previously can be added to it or offered in evidence.* Otherwise if the writing is informal, as a mere "bill of parcels" or a receipt, and the like.**

A general warranty is said not to apply to patent and obvious defects, which are apparent on a simple inspection, and do not require skill to discover; yet the warranty may be so expressed as to protect the buyer from the consequences of apparent defects in the thing sold.***

A warranty against unsoundness in horses, does not cover a temporary and curable injury existing at the sale, and such an injury is not a breach of the warranty unless the horse is unfitted for service in consequence, or the value is affected.**** Cribbing is held

Wason v. Rowe, 16 Vt. 525; 69 Ala. 111; Gentili v. Starace, 133 N. Y. 140.

*DeWitt v. Berry, 134 U. S. 312; Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281; Johnson v. Truesdale, 46 Minn. 347.

**Atwater v. Clancy, 107 Mass. 369; Hersom v. Henderson, 21 N. H. 224; Hazard v. Loring, 10 Cush. 267.

***Hill v. North, 34 Vt. 604; Leavitt v. Fletcher, 60 N. H. 182; Williams v. Ingram, 21 Tex. 300; Reed v. Hastings, 61 Ill. 266; Shewalter v. Ford, 34 Miss. 417; Birdseye v. Frost, 34 Barb. 367. The rule seeming to be that if an obvious defect is warranted against, it may be enforced against the seller. Fitzgerald v. Evans, 49 Minn. 541; Calaway v. Jones, 19 Ga. 277.

****Roberts v. Jenkins, 21 N. H. 116; Kornegay v. White, 10 Ala. 255; Thompson v. Bertrand, 23 Ark. 731.

to be an unsoundness, while lameness may or may not be according as to whether it is permanent or not.*

Warranties usually are understood to apply to the state of things existing at the time of sale only, but if the language is sufficiently clear and explicit it may enlarge the warranty to cover future infirmities and defects.**

Authorized agents may warrant the thing sold and bind the owner, but neither auctioneers, brokers, nor a special selling agent have power to warrant without express authority, or any usage or custom to that effect.*** And some cases hold that a general selling agent has no authority to warrant without express authority or a custom and usage to that effect.****

Sec. 1096. IMPLIED WARRANTIES.—Implied warranties are created by law, or spring from facts existing at the time of the sale, and from what the par-

*Walker v. Hoisington, 43 Vt. 608; Alexander v. Dutton, 58 N. H. 282; Brown v. Bigelow, 10 Allen 242.

**Bowman v. Clemmer, 50 Ind. 10; Miller v. McDonald, 13 Wis. 673; Fatman v. Thompson, 2 Disney, 482. In the last case the vendor of a slave warranted that he should be a slave for life in 1861, and the vendor was held liable for breach of this warranty, when in 1863 the slave was liberated by the Emancipation Proclamation. So articles may be warranted to last and be free from defects for a period of years, but such stipulations covering a term of years must be in writing under the statute of frauds.

***Blood v. French, 9 Gray, 198; Dodd v. Farlow, 11 Allen, 426; Cooley v. Perrine, 41 N. J. L. 322; 42 N. J. L. 623; Ahern v. Goodspeed, 72 N. Y. 108.

****Upton v. Suffolk Mills, 11 Cush. 586; contra, Murray Brooks, 41 Ia. 45; Talmage v. Bierhause, 103 Ind. 270.

ties did, rather than from what was said; they are silent contracts implied from the transaction. Ordinarily where there is an express warranty of one thing, as of one quality, there is no implied warranty of some other quality.*

Sec. 1097. IMPLIED WARRANTY OF TITLE.

—The rules established to determine when there is an implied warranty of title are mainly these:

1. In executory contracts of sale, the vendor, by implication, warrants his title to the goods he promises to sell. The reason for this is, that if A promises to sell a hundred bushels of wheat to B, the contract would not be fulfilled by a transfer of the mere possession of another man's wheat. So A, by promising to sell, impliedly warrants that he has the right to sell. No express assertion of ownership is necessary, as the sale itself is an assertion of ownership.**

2. In the sale of an ascertained, specific chattel, affirmation by the vendor that the chattel is his, is a warranty, and this affirmation may be implied from his conduct as well as from his words. Thus if the seller is in possession of the chattel, selling in his own right as absolute owner, there is an implied warranty of ownership.***

*The maxim is, *expressio unius est exclusio alterius*. International Pavement Co. v. Smith, 17 Mo. App. 264; Plow Works v. Niles Co., 90 Wis. 590; Deming v. Foster, 42 N. H. 175.

**Benj. Sales, Sec. 627.

***Darst v. Brockway, 11 Ohio, 462; Shattuck v. Green, 104 Mass. 42; Jeffers v. Easton, 113 Cal. 345; Morris v. Thompson, 85 Ill. 16; Hunt v. Sackett, 31 Mich. 18. By

3. In the absence of such implication, and where no express warranty is given, the vendor, by the mere sale of a chattel, does not warrant his title.* But, if, in such a case, the vendor knew he had no title, and concealed that fact from the buyer, he would be liable on the ground of fraud.

It is claimed in some text-books that the vendor does not by the mere act of sale assert that he has title, and it is so held in some of the leading cases. But the weight of authority seems to be in favor of the rule that warranty of title arises from the mere act of sale. That is, that the sale of a personal chattel implies an affirmation by the vendor that the chattel is his, and that he warrants the title, unless the facts and circumstances show a contrary intention, as that he intended only to transfer the interest he had in the thing sold. (*Eichholz v. Bannister*, supra.)

In America, it is the general rule that where goods

"possession," is meant constructive possession by a bailee, or agent as well as actual possession. *Harper v. Dotson*, 43 Ia. 232; 49 N. H. 310. So a warranty of title means, a free and perfect title, and would be broken if the chattel was subject to mortgage, pledge, incumbrance or lien. *Hodges v. Wilkinson*, 111 N. C. 56.

**Gould v. Bourgeois*, 51 N. J. L. 373; *Krumbhar v. Birch*, 88 Pa. St. 426; 2 Bl. Com. 451; *Morley v. Attenborough*, 3 Ex. 500; but see, *Eichholz v. Banister*, 17 C. B. N. S. 708, from which Mr. Benjamin states the true rule to be, "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold," *Benj. Sales*, Sec. 639.

are in the possession of a third person at the time of a sale there is no warranty by implication of the title in the seller, the maxim *caveat emptor* applies, and the vendee buys at his peril.* While if the goods are in the possession of the vendor, actual or constructive, there is an implied warranty of title.** But the agent of the vendor would not be considered a third person within the meaning of the rule. The fact of the vendor being out of possession, is held to be enough to put the vendee on inquiry.

The distinction made where the vendor is in or out of possession of the thing sold is held generally in the United States, but is not the rule in England, where there is no such distinction made. (*Pasley v. Freeman*, 3 T. R. 58.)

But in official sales, that is, sales by officers of the law of the interest of the defendant or party, as by sheriffs, executors, guardians, mortgagees, assignees in insolvency, and the like, there is no implied warranty of title in the party whom the officer represents, and it is simply his interest, whatever it may be, that is sold.***

In America there is also an implied warranty that the thing sold shall be of the kind or species that it is

**Huntington v. Hall*, 36 Me. 501; *Long v. Hickingbottom*, 28 Miss. 772; *Edick v. Crim*, 10 Barb. 445; *Scranton v. Clark*, 39 N. Y. 220.

***Bennett v. Bartlett*, 6 Cush. (60 Mass.) 225; *Burt v. Dewey*, 40 N. Y. 283; *Porter v. Bright*, 82 Pa. St. 141.

****Sheppard v. Earles*, 13 Hun. 651; *Hicks v. Skinner*, 71 N. C. 539; *Johnson v. Laybourn*, 56 Minn. 332; *Baker v. Arnot*, 67 N. Y. 448.

described to be, that is, an implied warranty of *identity*. In England this is called an implied condition, since the right of the vendee to return the article for a breach is more clear than in the case of an implied warranty.*

An implied warranty also arises in the sale of commercial paper, that the paper is genuine, that is, that the signatures to the paper are not forged; that the signers are competent to contract; but not that they are solvent and responsible.**

Sec. 1098. IMPLIED WARRANTY AS TO QUALITY OF GOODS—*caveat emptor*.—In respect to quality, the maxim of the common law, *caveat emptor*, (let the purchaser beware), is the general rule applicable to sales of personal property. The maxim of *caveat emptor* is universally adopted in America, save perhaps in South Carolina. In a sale of an existing specific chattel, inspected or selected by the buyer, or

*Peckham v. Davis, 93 Ala. 474; Dounce v. Dow, 64 N. Y. 411; Wolcott v. Mount, 36 N. J. L. 262; Webster Marble Co. v. Dryden, 90 Ia. 37; Morse v. Moore, 83 Me. 473; Holt v. Pie, 120 Pa. St. 425. The cases holding that a sale of an article as of a certain description, as "early strap-leaf turnip-seed," or "XX pipe iron," was an implied warranty that the article was of the variety and *character* represented. So in Jones v. George, 61 Tex. 345; a druggist was held liable for the failure of a crop, caused by the breach of his implied warranty in the sale of "Paris green," he having delivered "chrome green."

**Bank v. Morton, 4 Gray, 156; Ward v. Haggard, 75 Ind. 381; Meyer v. Richards, 163 U. S. 385; Lobdell v. Baker, 1 Met. 193; Swanzey v. Parker, 50 Pa. St. 450; Littauer v. Goldman, 72 N. Y. 506.

subject to his inspection, *caveat emptor* applies, no implied warranty of *quality* arises; or, as sometimes stated, "a sound price does not in and of itself, import a sound quality."* Where a chattel is to be made or supplied, as made to the order of the purchaser, there seems to be an implied warranty that it is fit for the purpose for which it is ordinarily used, and if it is for a specific use, warranty of fitness for that use is implied. So in a sale by sample the vendor impliedly warrants the bulk to be equal to the sample.**

But it is not to be assumed that in all cases where a sample is exhibited that the sale is by sample. The vendor may want to sell and so show a sample to the vendee; the vendee may ask if the others are all like the sample, but the vendor may not intend to sell by sample, and merely wish to better explain the goods and decline to warrant the bulk to be equal to the sample. (Barnard v. Kellogg, 10 Wall. 383.) Also the buyer may refuse to buy by sample, although the sample is shown, and may require an express warranty. When there is an express warranty there is no im-

*Hadley v. Clinton, 13 Ohio St. 502; Winsor v. Lombard, 18 Pick. 59; Day v. Pool, 52 N. Y. 416; Scott Lumber Co. v. Hafnerlothum, 91 Wis. 667; Morris v. Thompson, 85 Ill. 16; Moore v. McKinlay, 5 Cal. 471. These cases holding the maxim to apply in the sale of, a cow, fish, syrup, lumber, cattle, garden seeds, and the like. Contra, Timrod v. Schoolbred, 1 Bay, 324; Houston v. Gilbert, 3 Brev. 63, South Carolina cases.

**Myer v. Wheeler, 65 Ia. 390; Schnitzer v. Print Works, 114 Mass. 123; Hanson v. Busse, 45 Ill. 499; Leonard v. Fowler, 44 N. Y. 289; Dayton v. Hooglund, 39 Ohio St. 671; 5 Cal. 471; Boyd v. Wilson, 83 Pa. St. 319.

plied warranty in law. (De Witt v. Berry, 134 U. S. 306.)

If goods are sold by sample, and, upon inspection, the bulk is found not to be equal to the sample, there is no obligation upon the part of the buyer to accept, but, he is perhaps required to give notice that he will not take the goods. When that notice is given the goods are at the vendor's risk, and the vendee is under no obligation to put the goods in a warehouse or in the hands of a carrier. And by the usage of trade, an implied warranty of quality may be assumed by the purchaser.*

Where goods are sold by description, and the plaintiff has not inspected them, it is said, in some cases, that there is in addition to the condition precedent, that the goods shall answer the description, an implied warranty that they shall be salable or merchantable and *caveat emptor* does not apply.**

*Jones v. Bowden, 4 Taunt. 847, where it had been usual in auction sales of drugs to state in the catalogue whether they were sea-damaged or not, and in the absence of this statement, it was held that this was an implied warranty that they were not so damaged. But no usage repugnant to the terms of the contract could be admitted. 13 Allen, 353; 114 Mass. 123; 11 Allen, 426.

**Gardiner v. Gray, 4 Camp. 144; Jones v. Just, L. R. 3 Q. B. 197; Gaylord Mfg. Co. v. Allen, 53 N. Y. 518; Alden v. Hart, 161 Mass. 576; Howard v. Hoxey, 23 Wend. 350; Cullen v. Blim, 37 Ohio St. 236. In sales by sample there is no warranty that there is no latent defect in the sample or in the bulk; while they must be alike, neither of them must be perfect. This rule seems to be modified somewhat when applied to the manufacturers of an article. (Bradford v.

So goods purchased for a particular use, which use is made known to the seller, are impliedly warranted to be reasonably fit and suitable for that purpose. (*Morse v. Union Stock Yards*, 21 Or. 829; *Bierman v. City Mills Co.*, 151 N. Y. 482; *Byers v. Chapin*, 28 Ohio. St. 300; 41 Md. 389.)

But the warranty of goods to be merchantable only extends to goods at the time they leave the vendor's possession, and the vendor is not liable for any deterioration caused by the transit or shipment.*

And where the buyer relies upon his own judgment or skill to select suitable articles, though they are to answer a particular purpose known to the seller, yet the rule of *caveat emptor* applies. (*Benj. Sales*, Sec. 661; *Chanter v. Hopkins*, 4 M. & W. 399; 5 Q. B. 288.)

Sec. 1099. EXCEPTION TO THE RULE OF *caveat emptor*.—While it is the general rule that there is no implied warranty of quality in sales of an inspected and specific article, yet an important exception to this rule exists in the case where articles of food are bought for domestic consumption, and not for trade, in which case it is always implied that the provisions are wholesome. Thus it has been held that a baker warrants by implication the wholesomeness of bread,

Manley, 13 Mass. 139; *Sands v. Taylor*, 5 Johns. 404; *Jones v. Bright*, 5 Bing. 533; *Merriam v. Field*, 24 Wis. 640. The question of merchantability of an article is for the jury, 109 Cal. 242.

**Bull v. Robinson*, 10 Ex. 342; 34 Me. 289.

though sold at a discount to a peddler who is to distribute it.*

*Sinclair v. Hathaway, 57 Mich. 60; 96 Mich. 245; Howard v. Emerson, 110 Mass. 321; Giroux v. Stedman, 145 Mass. 439; Hanson v. Hartse, 73 N. W. Rep. 163.

CHAPTER VIII.

CONCERNING THE DELIVERY.

Sec. 1100.—IT IS THE VENDOR'S DUTY TO DELIVER.—“After the contract of sale has been completed, the chief and immediate duty of the vendor, in the absence of contrary stipulations, is to deliver the goods to the purchaser as soon as the latter has complied with the conditions precedent, if any, incumbent on him.” (Benj. Sales, Sec. 674.)

Just what is meant by delivery here may be confusing from the fact that word is used in three different senses in the law of sales. Thus, it is used with reference to the passing of title and change of possession; with reference to the transfer of possession, it may be used in connection with the formation of the contract, and the performance of it; and finally as used in delivery of possession in performance of the contract, it may be used where the sale is on credit, and be perfectly proper, and yet be only a *constructive* delivery so as to allow the seller to exercise the right of stoppage *in transitu*, if the purchaser becomes insolvent before the goods are *actually* delivered to him.

The delivery with which we are concerned in this chapter is that required of the vendor in transferring the goods to the buyer in performance of the contract, so as to defend an action by the buyer for non-delivery. The delivery necessitated to destroy the vendor's

lien or right of stoppage *in transitu* will be discussed in a subsequent chapter, and the other kinds of delivery have already been treated.

Sec. 1101. DELIVERY TO PASS PROPERTY BETWEEN THE PARTIES.—All the vendor has to do in order to pass property in the thing sold to the vendee, where there is no contrary agreement or usage, is to deposit the article in some convenient and suitable place for the buyer to take away whenever he may choose. Thus rolling a barrel of flour to the door, or laying the tied up bundle on the counter before the buyer is sufficient delivery on the part of the vendor to pass title to the vendee. The buyer would have a reasonable time in which to remove the goods, after which time any loss in the article would fall on him.* As a general principle then, “readiness to deliver,” and full opportunity in the buyer to take away, is amply sufficient to pass the title and the risk to the buyer; especially is this so where the buyer has taken a bill of sale or paid for the articles.** But it may be agreed that the property shall remain with the vendor until the fulfillment of conditions by the vendee, as the payment of the price. It often happens that there is a stipulation that the buyer shall take possession of the goods without paying for them at once. Where this is the agreement, the effect of the taking possession, or being given the opportunity to take possession on the

*Frazier v. Simons, 139 Mass. 531; Danforth v. Walker, 40 Vt. 257; 60 Ill. 190.

**McNamara v. Edminster, 11 Hun, 597; Dugan v. Nichols, 125 Mass. 43.

part of the buyer, is to pass the title and right to possession to him. But even where this is stipulated, should the vendee become insolvent, the vendee may refuse to deliver and exercise his right of lien to secure payment of the purchase price.*

In regard to this delivery, the vendor is bound only to put the goods at the buyer's disposal, not to send them. The sale is proven by delivery when the property is so situated that the buyer can take possession of it rightfully.** But if the seller is bound by agreement or custom and usage to carry and deliver the article at a fixed place, he must do so, and within a rea-

*106 Mass. 422; 51 Vt. 489; *White v. Welsh*, 38 Pa. St. 421; 4 B. & C. 941. In this last case, *Bloxam v. Sanders*, Bayley J. delivering the judgment said: "Where goods are sold and nothing is said as to the time of delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, upon payment of the price; but the buyer has no right to have possession of the goods until he has paid the price. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part; and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the *right of possession*, and the *right of property* vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession."

***Sibley v. Tie*, 88 Ill. 287; 100 Mass. 523; 23 Vt. 88; 25 N. Y. 520.

sonable time, before he can recover the price.* Where the delivery by the vendor is to take place on the doing of a certain thing or act by the purchaser, the vendor is not in default for non-delivery, until given notice of the performance of the act upon which the delivery is to take place.**

Sec. 1102. AS TO THE PLACE OF DELIVERY.—As to the place of delivery, the contract being silent upon this point, it is usually the place where the goods are when sold. If the contract imposes upon the vendor the obligation of sending the goods, the time not being stated, they must be sent in a reasonable time. The word *month* in this connection means a calendar month. If a number of days are named, Sundays are to be counted. If the delivery is to be “as soon as possible,” it means as soon as the vendor can deliver with reference to his ability to furnish the articles, consistently with the prior orders then on hand.***

Sec. 1103. AS TO THE SUFFICIENCY OF THE DELIVERY.—The vendor must not deliver more nor less than the contract requires, and if he does, as a general rule, the buyer is entitled to refuse

*Steel Works v. Dewey, 37 Ohio St. 242; Iron Co. v. Cuppy, 41 Ia. 104; Rhoades v. Colter, 90 Me. 453; but if the buyer is to designate the place of delivery and fails to do so, the delivery is excused. Hunt v. Wetsell, 84 N. Y. 549; Stokes v. Mackay, 147 N. Y. 235.

**14 Q. B. 728.

***Benj. Sales, Sec. 682-686; Co. Lit. 210b; Hatch v. Oil Co., 100 U. S. 134; Ellis v. Thompson, 3 M. & W. 445; Atwood v. Emery, 26 L. J. C. P. 73.

the whole of the goods. But if the vendee makes a selection out of the whole it is such an appropriation as will pass title to him.* In every delivery the vendor is bound to give the vendee the opportunity of examining the goods to see if they conform to the terms of the contract.**

So there may be a constructive or symbolical delivery of goods which will pass title and transfer possession to the buyer. Thus where goods are ponderous or incapable of being handled, there may be a constructive delivery, such as the delivery of a key to a warehouse which contains the goods, or the bill of sale of a vessel which is at sea and incapable of being actually delivered.***

*Reuter v. Sala, 4 C. P. D. 239; Hart v. Mills, 15 M. & W. 85; 81 N. Y. 341; Klein v. Tupper, 52 N. Y. 555; Brawley v. The United States, 96 U. S. 168; in the last case the effect of qualifying words in a contract, as "more or less" are considered, and are said to mean where used in connection with the sale of a cargo, or unmeasured stock, to mean that the estimated quantity is not a warranty but a mere estimate in good faith, and whether more or less is delivered would make no difference, while the mere addition of the words to a contract, where the engagement is to furnish goods to a certain amount, only operates to guard against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.

**14 M. & W. 347; in this case the buyer having received notice that the goods were at a certain warehouse ready for delivery after the payment of the price, asked to see the goods, and was shown two casks said to contain them, and no further opportunity being allowed to examine them, the court held that the plaintiff had not made the necessary and contemplated offer of delivery.

***Atkinson v. Maling, 2 T. R. 462; Ayers v. McCandless,

The endorsement and transfer of bills of lading, dock warrants, and other like evidences of ownership constitute a good delivery so as to defeat an action for non-delivery, though it might not be sufficient delivery as against second purchasers.*

So the rule as to the delivery of growing crops is somewhat relaxed in some States on account of the obvious impossibility of putting the vendee in possession without taking the land itself. Where the part sold of a field of growing corn was distinguished from the rest by cutting the tops off a row separating them, it was held a sufficient delivery as against a subsequent levy (by the creditor) of the vendor.** The rule is stricter as to trees and grass (*fructus naturales*), than as to annual crops (*fructus industriales*) and in some cases a delivery of the former without severance from the soil is held to be impossible.***

147 Pa. St. 49; Dubois v. Spinks, 114 Cal. 289; 55 Mich. 686; 57 Vt. 565; 53 N. Y. 426; 44 Ill. 141; Putnam v. Dutch, 8 Mass. 287; Brinley v. Spring, 7 Greenl. 241; the latter cases holding that the sale of a vessel or cargo by bill of sale, the property being at sea, is good, if the buyer takes possession as soon as they arrive in port. A reasonable taking possession is important, and is a question for the jury. Joy v. Sears, 9 Pick. 4.

So a delivery upon a sale of goods is sufficient if it is all the contract contemplated. 54 Mich. 1; 55 Mich. 686.

*Wood v. Manley, 11 A. & E. 34; Winslow v. Leonard, 24 Pa. St. 14; Cole v. Bryant 73 Miss. 297; Dugan v. Nichols, 125 Mass. 43.

**Graff v. Fitch, 58 Ill. 373.

***Stone v. Peacock, 35 Me. 386; Lamson v. Patch, 5 Allen, 586.

CHAPTER IX.

THE BUYER'S DUTIES—ACCEPTANCE, PAYMENT AND TENDER.

Sec. 1104. WHAT ARE THE BUYER'S DUTIES?—The vendor having done his duty, the vendee must do his, and this consists of two things: 1. To accept the thing purchased; 2. To pay or tender the price.

In ordinary sale, there being no stipulations to the contrary, the vendor, to maintain his action against the vendee, needs only to aver a readiness and willingness to deliver on the payment of the price. He need not show that the vendee accepted, for the law presumes that the vendee must accept.*

If the vendee makes a default in taking away the goods within a reasonable time from the place of sale, he thereby becomes liable to the vendor for warehouse charges, storage, or expenses growing out of the custody of the goods, and if the vendor is prejudiced by the delay, the vendee would be liable to an action for damages.** The vendor would have no right to treat the contract as rescinded on account of the mere delay of the vendee to take away the goods, unless he had given the vendee notice that he must take them

*Cutter v. Powell, 2 Smith's L. Cas. 1; Nichols v. Morse, 100 Mass. 523; 62 N. Y. 272; 20 Oreg. 172; 6 Wash. 299.

**Greaves v. Ashlin, 3 Camp. 426; 30 Vt. 633; 60 Ill. 71.

away. The question of reasonable time here is one for the jury under all the facts of the case.*

Sec. 1105.—ACCEPTANCE.—Delivery and acceptance are concurrent conditions. The vendee's duty to accept depends altogether on the sufficiency of the vendor's delivery. The delivery must conform to the contract in every particular, and then the duty to accept arises. The buyer has also the right to inspect the goods and reject them within a reasonable time after receipt if they do not answer the description.** But the buyer cannot insist upon doing something with the goods not contemplated by the contract before accepting.

The buyer having had a full and fair opportunity to examine the goods, by accepting them, waives his right to object to them as to any visible defects and imperfections, whether discovered or not, in the absence of a warranty intended to survive such acceptance. (*Studer v. Bleistein*, 115 N. Y. 317.)

The buyer is not bound to pay for goods by merely receiving them, but when he finds that the goods are not according to the contract, it is his duty, within a reasonable time, to notify the vendor of that fact, or he may be considered as accepting.*** The notice to the vendor need not designate the defects in the

**Buddle v. Green*, 3 H. & N. 906.

***Charles v. Carter*, 96 Tenn. 607; *Edwin v. Harris*, 87 Ga. 333; *Pierson v. Crooks*, 115 N. Y. 539.

****Hudson v. Germain Fruit Co.*, 95 Ala. 621; 115 N. Y. 317; 79 Ill. 131; 108 N. Y. 232; 103 Mich. 403; 86 Wis. 441; 89 Ia. 506; 91 Ky. 373.

goods, especially if the defects are known to the seller.* The notice may be waived by the vendor, and where it is stipulated that the notice of defects shall be given in writing this may be waived so as to make oral notice sufficient.** If the goods are retained and put to any use inconsistent with the vendor's ownership it will be considered as an acceptance by the buyer.***

Sec. 1106. THE BUYER'S DUTY TO PAY OR TENDER PAYMENT.—It is the buyer's duty, a proper delivery having been made or tendered, not only to *accept* but to *pay*. Payment, or its equivalent, may be made in either of three ways; 1. In cash; 2. In notes or bills of exchange; 3. By credit agreed upon. This last is not properly a payment, but rather exempts the buyer from making payment at the time of acceptance.

When nothing is said about the payment, absolute payment in cash is required. Therefore an action lies at once against the buyer for the price, and this is so whether he has taken away the goods or not.**** If under the contract of sale no place of payment is provided for, payment may be made at any place the parties meet; but the buyer is bound to find the vendor and make the payment, if the vendor is within the

*White Bronze Co. v. Gillete, 88 Mich. 231.

**Suit v. Bonnell, 33 Wis. 180; Mfg. Co. v. Feary, 40 Neb. 226; Mfg. Co. v. Hanson, 3 No. Dak. 81; Kingman v. Watson, 97 Wis. 596.

***Brown v. Foster, 108 N. Y. 387; 97 Wis. 596.

****Benj. Sales, Sec. 706, 708; Behrends v. Beyschlag, 50

State. It seems, however, that the vendee need not seek him outside of the State.*

By "cash" is meant legal tender of the country in which the payment is to be made. But if the parties have contracted as to the kind of money in which payment is to be made, this will control; so where the contract is "payable in gold," nothing but gold can be made a valid payment of the debt. A special judgment is rendered in a suit on such a contract, "to be paid in gold."**

If the buyer makes the payment in the mode requested by the vendor, as where the vendor requests it to be sent by post, the vendee will be discharged though the money never reaches the vendor.*** In the absence of a request upon the part of the vendor, a payment made by post is at the risk of the buyer or sender.****

So the payment may be made in any way the parties agree, as by the buyer and seller agreeing that the buyer shall give the vendor credit on an account due from the vendor to the vendee, and the transaction

Neb. 304; *Bank v. Cannon*, 46 Minn. 95; 21 Minn. 15; *Sweet v. Titus*, 67 Barb. 327; 65 N. Y. 565; 20 N. J. Eq. 39.

*21 Minn. 15; 65 N. Y. 565.

***Currier v. Davis*, 111 Mass. 480; 105 Mass. 334; *Bronson v. Rhodes*, 7 Wall. 229; 110 U. S. 421. As to meaning of legal tender see former numbers of this Series, No. 2 and No. 4.

****Hawkins v. Rutt, Peake*, 186, 248; *Eyles v. Ellis*, 4 Bing. 112; 84 N. Y. 63; 99 Mass. 596.

*****Gordon v. Strange*, 1 Ex. 477; 78 Mass. 348; 69 Pa. St. 156.

then operates as if on a cash basis, the one paying so much cash, and the other crediting so much cash on the other's account.*

Sec. 1107. SAME SUBJECT—TENDER.—When there is no special mode of payment agreed upon, it becomes the buyer's duty to make actual payment in cash, or a tender of payment, which if properly made is as sufficient as payment as to his duty to perform.

Where a tender of payment is made by the buyer and refused by the seller the question arises as to its sufficiency. It is only valid when the buyer produces and offers to the vendor an amount of money equal to the price of the goods. But such a tender may be waived, as well as payment. If the buyer tenders a check in payment, the vendor is not bound to accept it; but if a check is tendered in payment and it is refused, not because it is a check, but because the vendor waives or refuses to accept payment, it is a waiver of a valid tender. As a rule the creditor should be allowed to see and count the money. The courts are less rigorous in inferring a waiver of tender or payment, where there is something produced at the time of the offer to pay, than where no money is produced. It appears that a tender of more than is due, is in some cases held a good tender, as the creditor should take what he is entitled to, or could take the whole amount. But the tender of a larger sum than is due, with the demand for change,

*Livingstone v. Whiting, 15 Q. B. 722; Ashby v. James, 11 M. & W. 542; 15 M. & W. 683.

is not a valid tender. So the tender must be unconditional, and free from any reservation or condition to which the creditor might rightfully object, thus the buyer would have no right to demand, as a condition attached to the tender, a receipt in full of his account, or for the price.*

Sec. 1108. PAYMENT BY PROMISSORY NOTE OR BILL.—A payment by promissory note is understood generally to be a conditional payment. The vendor's right to the price revives on non-payment of the note. A payment by check is usually regarded as a *prima facie* cash payment if the check is accepted. If, however, the check is dishonored, the vendor may resort to his original claim. But if the check is not presented within a reasonable time after the vendor takes it in payment, and a loss results, the vendor must stand the loss.**

*See this subject under Contracts, in No. 4, of this Series; Benj. Sales, Secs. 712-728; Isherwood v. Whitmore, 11 M. & W. 347; Polglass v. Oliver, 2 Cr. & J. 15; Bevans v. Rees, 5 M. & W. 306; Dixon v. Clarke, 5 C. B. 365; Bowen v. Owen, 11 Q. B. 130; Cole v. Blake, 1 Peake, 238. By statute in England, it is provided that the buyer may tender a blank receipt with the stamp required by law, and the creditor is bound to fill it up when the payment is tendered. 16 & 17 Vict. c. 59s3, 4. The effect of the tender in England is that it is a bar to the action for the amount, and not merely a bar to damages. James v. Vane, 2 E. & E. 883, but the money previously tendered must be brought into court, that is, continue to be tendered. See also, 5 N. H. 440; 67 Miss. 133; 49 Ind. 269; 51 Tex. 98; 90 Ala. 302; 82 Me. 185; 5 Pick. 105; 39 N. J. L. 413; 119 N. Y. 561; 110 Ala. 322; 35 Conn. 557.

**Broughton v. Silloway, 114 Mass. 71; Hodgson v. Bar-

In most States payment by promissory note amounts to nothing more than a credit extension. Thus if the vendor takes a note for ninety days, he has no right to resort to his original claim until the time for the payment of the note has elapsed.* But the note or bill is regarded as *prima facie* evidence of payment to the extent that when the vendor seeks to assert his original claim he must account for the note, and offer to return it.** In a few States a promissory note so given is regarded as *prima facie* payment in and of itself, and in these States if there is no fraud involved, the vendor who has taken a promissory note in payment cannot return to the original contract and sue upon it.***

Where a note of a third person is given by the buyer in payment, unless there is positive proof that such note was to be received in final payment, it is considered merely conditional security, and only operates as

rett, 33 Ohio St. 63; Thompson v. Bank, 82 N. Y. 1; Mordis v. Kennedy, 23 Kan. 408. If the parties so agree or intend, the check may be absolute payment. Blair v. Wilson, 28 Gratt. 165; 24 Wis. 607.

*Archibald v. Argall, 53 Ill. 307; 93 Ill. 357; 124 Mass. 366; 43 N. Y. 171; 33 Ohio St. 63; 29 Pa. St. 448; 36 Wis. 149; 9 S. C. 70; 37 Ia. 244.

**Walsh v. Lennon, 98 Ill. 27; Foster v. Hill, 36 N. H. 526; Hughes v. Israel, 73 Mo. 538; League v. Waring, 85 Pa. St. 245.

***Dodge v. Emerson, 131 Mass. 467; Bunker v. Barron, 79 Me. 62; 46 Vt. 458; Kurtsinger v. Brown, 72 Ind. 466; Hunt v. Boyd, 2 La. 109. The *prima facie* presumption that the note was taken in payment may be easily rebutted, and then the suit may be brought on the sale contract.

an extension of credit until the note is due.* This is the general rule, but a few States hold that such a payment is *prima facie* payment, until the inference is defeated by something going to show that this was not the intention of the parties.** If the note given proves worthless it seems that the creditor can dis-affirm the sale, surrender the note, and sue upon the original debt, the worthless note not constituting a consideration for the sale.*** In New York it is held that the creditor can sue upon the original claim though he has accepted the note, on the ground of mistake of fact, the mistake arising from the worthlessness of the note, each believing it to have been of value and constituting a consideration.****

Payment of a debt may be presumed after the lapse of twenty years from the time it became due and payable; but at common law this presumption may be rebutted by showing that the debtor was unable to pay, that he was absent from the State, or insane, and the like.*****

*Johnson v. Weed, 9 Johns. 310; Holmes v. Briggs, 131 Pa. St. 233; otherwise if the note is agreed to be taken as a final payment, which is a question for the jury. See, Wise v. Chase, 44 N. Y. 337; Sebastian May Co. v. Codd, 77 Md. 293.

**Ely v. James, 123 Mass. 127; 67 Ind. 67.

***Little v. American Co., 67 Ind. 67; 74 Me. 553; 8 Cal. 501; 36 N. Y. 520; Hartshorn v. Hartshorn, 67 N. H. 163.

****Benedict v. Field, 16 N. Y. 595; 43 N. Y. 157.

*****Bentley's Appeal, 99 Pa. St. 500; Andrews v. Sparhawk, 13 Pick. 393; Daggett v. Tallman, 8 Conn. 168; Reed v. Reed, 46 Pa. St. 239; Bissell v. Jaudon, 16 Ohio St. 499.

CHAPTER X.

AVOIDANCE OF THE CONTRACT.

Sec. 1109. MISTAKE AND FAILURE OF CONSIDERATION. One who has given apparent assent to a contract of sale, if the assent was founded on a mistake of a material fact, not of law, such as the subject-matter of the sale, the price, or in some cases the identity of the other contracting party, will not be bound thereby, as the contract has not come into existence for the want of valid assent.* Thus it is stated by C. J. Bigelow that, "Where parties to the contract of sale agree to sell and purchase a certain kind or description of property, not yet ascertained or distinguished or set apart, and subsequently a delivery is made, by mistake, of articles different in their nature or quality from those agreed to be sold, no title passes by such delivery."** So where there has been a common mistake as to some essential fact forming an inducement to the sale, that is, if the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable. And if either party has performed his part during the continuance of the mistake he may set aside the sale on discovering the truth on the ground of failure of consideration. But if he cannot

*Benj. Sales, Sec. 414; *Strickland v. Turner*, 7 Ex. 208.

**In 9 Allen, 492.

set aside the contract and leave the parties in *statu quo*, he must go forward with the contract and resort to his action for damages against the other party.*

There are cases where the contract has been carried into effect during the continuance of the mistake, and where the party in error is no longer passively declining to execute the contract, but is actively seeking to set it aside by reason of the mistake. It is said that when the mistake is of one party only, and unknown to the other, the party laboring under the mistake must bear the consequences. That is, if a man buys goods which he believes to be of a certain kind and the seller does not know that he believes the goods to be of that particular kind, the buyer must bear the results of his own error. Where the error of the one is known to the other contracting party it resolves itself into a question of fraud.**

Where there is a failure of consideration, as where an article is bargained to be sold; and does not exist, or is of a different kind, the buyer may recover the

*Hunt v. Silk, 5 East, 499; Kimball v. Cunningham, 4 Mass. 502; Thayer v. Turner, 8 Met. 550; Cook v. Gilman, 34 N. H. 560; 79 Ind. 380. See, Boulton v. Jones, 2 H. & N. 564, and Ice Company v. Potter, 123 Mass. 28, in which mistake of identity of party avoided the contract.

***Doe v. Oliver, 2 Smith's Leading Cas. 803; Freeman v. Cooke, 2 Ex. 654; Kennedy v. Panama Mail Co. L. R. 2 Q. B. 580. It is a general rule of law that, whatever a man's real intention may be, if he manifests an intention to another party, so as to induce that other party to act upon it, he will be estopped from denying that the intention as manifested was his real intention.

price paid to the seller. But to do so he must tender back the article he received if it was of any value. So where the failure of consideration is partial the buyer may rescind the contract, if it is entire, and he has not accepted part.*

But in an entire sale, the failure of consideration as to part, the rest being received and enjoyed, will not authorize a partial rescission and a recovery of what has been paid. Otherwise if the articles purchased are distinct and separate, and the sale is not entire.**

Where the buyer gets substantially the thing which he contracted for, though the article is absolutely worthless, he cannot complain, since he has received what he bargained for, and there is no failure of consideration.***

Sec. 1110. FRAUD AS AVOIDING THE CONTRACT.—It is a general rule that fraud renders all contracts voidable *ab initio*, both at law and in equity. Fraud cannot be accurately defined. It has been said that every kind of artifice employed by one person for the purpose of deceiving another is fraud.**** The

*Fay v. Oliver, 20 Vt. 118; Vance v. Schroyer, 79 Ind. 380; if the article is of no value, or has been consumed in testing as allowed by the contract return is unnecessary, Brewster v. Burnett, 125 Mass. 68; a purchase of counterfeit bonds, and Quano Co. v. Mullen, 66 Ala. 582, a sale of fertilizer. See, 90 Ind. 48; and 50 C. B. 667, as to partial failure of consideration.

**Clark v. Baker, 5 Met. 452; Mansfield v. Triggs, 113 Mass. 350; 121 Mass. 91; Herzog v. Purdy, 119 Cal. 99.

***Lamert v. Heath, 15 M. & W. 487; L. R. 10 Q. B. 491.

****Benj. Sales, Sec. 428.

Civil Code of France, without giving a definition, provides in Art 1116: "Fraud is a ground for avoiding a contract when the devices (*les manœuvres*) practiced by one of the parties are such as to make it evident that without these devices the other party would not have contracted."

Though difficult to define, the elements of fraud may be designated, and these are, according to Mr. Benjamin: 1. To constitute fraud it is essential that the means should be successful in deceiving. 2. To be fraudulent, representations must be material; that is, the fraudulent representation must go to some essential part of the contract, but the fraud need not be the sole inducement to the contract. 3. There can be no fraud without dishonest intention in fact; that is, though the representations by the one party to the other are untrue, yet if made *honestly* and on *reasonable grounds*, they are not grounds for avoiding the contract as obtained by fraud. Though this rule is controverted in some cases.* 4. There must be damage to the party deceived as a result of the false representation, before a right of action arises. Or, as it has been said, "Fraud, without damage, or damage without fraud, gives no cause of action."**

The mistaken belief as to facts may be created by *active* means, as by fraudulent concealment or knowingly false representations; or, *passively*, by mere

*Benj Sales, Sec. 429; *Redgrave v. Hurd*, 20 Ch. D. 12.

***Pasley v. Freeman*, 3 T. R. 51; *Attwood v. Small*, 6 Cl. & Fin. 443.

silence when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another, that mere silence will be deemed deception.* The particular circumstances of the case must determine whether the silence amounts to fraud or not. Where the article is open to the inspection of the purchaser, he cannot complain if the defects are not pointed out to him. So the vendor is at liberty to praise his goods in order to enhance their value if he abstains from fraudulent representations, and the buyer has had full and fair opportunity to inspect the goods. If the buyer then desires further protection than his own judgment he must require a warranty.

The fraud may be perpetrated on the vendor; on the vendee, or on creditors. And, further, a party may become liable in an action founded on *tort* for fraud or deceit or negligence in respect to a contract, by a stranger, or any one who may be injured by such deceit or negligence. This liability being limited in this, that the third person, to maintain his action, must show that the injury came by acting upon defendant's false representation, made with the direct intent that he should act upon it and in the manner which occasioned the injury.**

***Benj. Sales, Sec. 430. "The rules are *Caveat emptor* and *Simplex commendatio non obligat*."

**Langridge v. Levy, 2 M. & W. 519; 4 M. & W. 337; Barry v. Croskey, 2 J. & H. 22. In the last case the limits of responsibility for false representation were stated to be: "First. Every man must be held responsible for the consequences of a false representation made by him to another.

Sec. IIII. SAME SUBJECT—FRAUD ON THE VENDOR.—Prior to 1866 it had not been settled whether the property passed when the sale was induced by a fraud on the vendor. Then it was decided in England that a distinction should be made between cases where the fraud had resulted in transferring the mere possession to the vendee, or whether the title and possession were so delivered, in the former case no title passed, in the latter case it did pass regardless of the fraud.* So now generally, whenever goods are obtained from their owners by fraud, the contract is *voidable* at the election of the vendor, and not void *ab initio*.**

It is optional with the vendor to affirm and enforce the contract, or avoid or rescind it. If he sues in assumpsit for the price of the goods, with full knowledge of the fraud, he thereby affirms the contract; if he sues in trover or replevin for the goods, he thereby disaffirms the contract.*** In the meantime, and until

upon which that other acts, and, so acting, is injured or damaged. Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damaged, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. Thirdly. The injury must be the immediate and not the remote consequence of the representation thus made."

*Stevenson v. Newnham, 13 C. B. 285; Pease v. Gloahec, L. R. 1 P. C. 219.

**38 Me. 561; 91 Ill. 605.

***Raphael v. Reinstein, 154 Mass. 178; 177 Mass. 23; 38

he elects, if the vendee transfers the goods to an innocent purchaser for a valuable consideration, the rights of the vendor will be subordinate to the rights of the innocent third person. Except where the vendor has not intended to part with the title, but only with the possession, in such cases the innocent purchaser gets no title, for the fraudulent vendee had none to give; and in some States the rule is stated that the title taken by an innocent purchaser from a fraudulent vendee depends upon whether the fraud went only to the motive or inducement of the sale, or to the origin and foundation of the contract, in the former case the innocent purchaser would take title, in the latter he would not.*

When the vendor rescinds the contract he must return anything of value received from the vendee. (4 Mass. 502; 48 Neb. 124; 18 N. H. 397.) If part of the goods have been sold by the fraudulent vendee, the purchaser may retain the part payment made, and rescind; and so where the vendee has damaged the

Me. 561; Kimball v. Cunningham, 4 Mass. 505; Joslin v. Cowee, 52 N. Y. 90. Having affirmed the contract the vendor cannot avoid; and having duly avoided, he cannot affirm. Pence v. Langdon, 99 U. S. 582; 87 N. Y. 166. The fraud does not shorten the time of payment where credit has been given. 93 Ill. 265.

*Rodliff v. Dallinger, 141 Mass. 1; 135 Mass. 283; Easter v. Allen, 8 Allen, 7; Devoe v. Brandt, 53 N. Y. 462; Iron Co. v. Bank, 101 Mich. 146; Neff v. Landis, 110 Pa. St. 204; Scheuer v. Goetter, 102 Ala. 313; 49 Ill. 458; 49 Wis. 316.

goods to a greater amount than the payment. (23 N. Y. 264; 84 Fed. Rep. 293; 47 Neb. 228.)

In an action concerning the title to the goods, when the vendor has made out a *prima facie* case of fraud against the vendee, the third person claiming title under the vendee has the affirmative—that is to say, he must show satisfactorily to the jury that he is a *bona fide* purchaser, which involves; 1. That he had no notice of the fraud perpetrated upon the vendor; 2. That he paid a valuable consideration; 3. That the valuable consideration was something paid at the time, that is, a present payment, and not a payment by the cancellation of a previous debt. (90 Mass. 10; 2 Head, 669; Peterson v. Steiner, 108 Ala. 629.)

The two main grounds of fraud which justify the vendor in rescinding a sale and reclaiming his goods, are—

1. Where the buyer has made fraudulent representations to the vendor as to his solvency or means of payment. A fraudulent misstatement of a material fact in this regard renders the contract voidable. Thus false statements as to the nature of his business, the property he owns, the volume of business he does, and as to incumbrances thereon, are all of this class.*

2. Where the vendee purchases the goods with the preconceived design of not paying for them. This also, as a general rule, avoids the sale.**

*Van Neste v. Conover, 20 Barb. 547; Reid v. Cowduroy, 79 Ia. 169; 18 Am. St. Rep. 359; Gregory v. Schoenell, 55 Ind. 101.

**Stewart v. Emerson, 52 N. H. 301, a leading case;

Sec. 1112. SAME SUBJECT—FRAUD ON THE BUYER.—The buyer may refuse to take the goods in case he is defrauded by the contract, if he discovers the fraud before delivery; or he may return them after delivery on discovering the fraud. If he has paid the price he may recover it back on offering to return the goods in the same state in which he received them.*

If either party has a right to rescind, he must rescind all the contract. (22 Pick. 457.) The ability to restore the thing purchased unchanged in condition, is indispensable to the right to rescind, so that if the buyer has innocently changed that condition while ignorant of the fraud he cannot rescind, but must

Brower v. Goodyer, 88 Ind. 572; Farwell v. Hanchett, 120 Ill. 573; 166 Mass. 57; 67 Mich. 410; 93 N. C. 31; 46 Mo. 181; 93 U. S. 631. Contra, Smith v. Smith, 21 Pa. St. 367; 156 Pa. St. 591. The fact that the party buys more than he usually does; or as soon as he gets possession of the goods mortgages them; or is insolvent, are all important in determining whether the party had the *intention not to pay for the goods*, and go to the jury. It is not enough to make out the intent that the party was not able to pay for them when they were bought, the jury must find that he did not intend to pay. If the party intends to pay and believes that he will be able to do so, the fact that he is mistaken will not make him guilty of fraud. Diggs v. Denny, 86 Md. 116; 33 Cal. 620; 115 Ind. 513; 101 Mich. 1. See, Talcott v. Henderson, 31 Ohio St. 162.

So a combination of buyers or bidders at an auction to prevent competition would justify the vendor in rescinding a sale. (Jackson v. Morter, 82 Pa. St. 291; Gardiner v. Morse, 25 Me. 140.) Otherwise if the combination is simply to have one buy for all and then divide the purchases (Kearney v. Taylor, 15 How. 521).

*2 Ex. 538; Page v. Parker, 43 N. H. 369; Martin v. Jordan, 60 Me. 531; Ins. Co. v. Crane, 134 Mass. 56.

resort to some other remedy. (10 H. L. 421.) So the contract is only voidable, and not void. If the buyer by any act has treated the goods as his own, after discovering the fraud his election will be determined, and he cannot then return the property. (50 Ia. 325.) The same result may come about by delay, for if the buyer does not rescind promptly, and the vendor's position has been altered, the right to rescind is lost, and the buyer must resort to other remedies.*

As to what constitutes such a fraud on the buyer as will authorize him to rescind, the early cases in England were in conflict, but in 1845, the Exchequer Chamber stated the true principle to be, that representations false in fact give no right of action if *innocently made* by a party who believes the truth of what he asserts; and, in order to constitute fraud, there must be a false representation *knowingly made*, that is, a concurrence of fraudulent intent and false representation. And a false representation is knowingly made, when a party for a fraudulent purpose states what he does not believe to be true, even though he may have no knowledge on the subject.**

It is unnecessary to prove a corrupt motive, this will be inferred if the representation is untrue, and the

*L. R. 7 Ex. 26; 45 Vt. 336; 1 A. & E. 40.

**Ormrod v. Huth, 14 M. & W. 651; Evans v. Collins, 5 Q. B. 820; Childers v. Wooler, 2 E. & E. 287; Joliffe v. Baker, 11 Q. B. Div. 255; Stone v. Denny, 4 Met. 151; Binneay's Appeal, 116 Pa. St. 169; Ins. Co. v. Matthews, 102 Mass. 226; Kountz v. Kennedy, 147 N. Y. 124; Scroggin v. Wood, 87 Ia. 497. Contra, Holcomb v. Noble, 69 Mich. 396, where it seems actual intention to defraud is unnecessary.

party making it knows it to be untrue, and it is intended that the other party shall act upon it by reason of which damage is actually sustained.*

From the leading cases it may be laid down that in order to constitute deceit or fraud, the following things must concur:

1. It must be a false representation of a material fact on the part of the vendor.

2. It must be one on which the vendee relies in whole or in part, and which was made with the intention that he should rely upon it.

3. It must be one which deceives the vendee, and through which he suffers damage.

4. And, except in Michigan, these things must have been done with a fraudulent intent, that is, it must be false to the knowledge of the vendor, or made recklessly, without reasonable grounds for believing it true, or under circumstances which show that he was indifferent whether it was true or false.**

All these things concurring the contract is voidable at the option of the vendee or vendor, whichever is imposed upon, if he has done nothing which expressly or impliedly affirms the contract. No notice of rescission is necessary before bringing an action for

*Foster v. Charles, 6 Bing, 396; Polhill v. Walter, 3 B. & Ad. 122; Stewart v. Stearns, 63 N. H. 105; O'Donnell v. Clinton, 145 Mass. 462; Zinc Co. v. Bamford, 150 U. S. 665; 90 Pa. St. 359.

**Smith v. Chadwick, 9 App. Cas. 187; Derry v. Peek, 14 App. Cas. 337; Salisbury v. Howe, 87 N. Y. 129; McKown v. Furgason, 47 Ia. 637.

the goods, the suit operating as notice of intention to rescind. No demand is necessary if the possession of the defendant is tortious, but demand should be made if the possession is rightful.*

The vendee may keep the property, and when sued for the price, show the fraud in reduction of the claim. So he may keep the property and sue in tort for the fraud; or bring a bill in equity to set aside the sale.**

False statements to a commercial agency, or to another merchant, intended to be communicated to the plaintiff, and on which he relies, will constitute a fraud as though made to the party directly. But the reliance on such statements must be within a reasonable time after they are made, and the statements must have been made within a reasonable time before the sale.***

If the fraud perpetrated on the buyer has been perpetrated by an agent of the vendor the right to rescind is the same, the cases holding that if the principal is honest and the agent not, or the principal dishonest but the agent not, the vendee may still rescind, return the property and refuse to pay, or if he has paid

*L. R. 7 Ex. 26; 125 U. S. 250; *Strong v. Strong*, 102 N. Y. 69; *Tarkington v. Purvis*, 128 Ind. 182; *Parmlee v. Adolph*, 28 Ohio St. 10; 110 Mich. 63; 66 N. Y. 558; 70 Conn. 125.

***Dogget v. Emerson*, 3 Story, 700; *Cheongwo v. Jones*, 3 Wash. C. C. 359; *Burnett v. Smith*, 4 Gray 50. But he cannot collect twice for the fraud.

****Mooney v. Davis*, 75 Mich. 188; *Kelly v. Gould*, 19 N. Y. Supp. 349; *Bliss v. Sickles*, 142 N. Y. 647; 166 Pa. St. 199.

recover the price from the principal.* And by some authorities the buyer can sue the principal for the deceit of the agent;** but others hold that this could only be done if the principal, knowing of the agent's fraud, has distinctly affirmed and approved it.***

Since a sale at auction is on the principle that everything is fair and open, any unfair means by the auctioneer to enhance the bids, as by announcing false bids, or having secret signals with persons as to bids, by which the buyer is deceived, will justify the avoiding of the sale.****

Sec. 1113. SAME SUBJECT—FRAUDS ON CREDITORS.—Where the fraud affects creditors, the vendor and vendee are still bound by the contract they have made; the property passes, the vendee is bound to pay the price to the vendor, and is liable on his note for the price.***** The objection to the sale must be raised by creditors or purchasers of the vendor.

As to what constitutes a fraud on creditors, it may be stated that, ordinarily unless both parties share in the *intent to delay, hinder, or defraud* creditors, there

*Veazie v. Williams, 8 How. 134; Jewett v. Carter, 132 Mass. 335.

**Fitzsimmons v. Joslin, 21 Vt. 139; Durant v. Rodgers, 87 Ill. 511; 47 N. Y. 174; 101 Ind. 294.

***Kennedy v. McKay, 43 N. J. L. 288; 47 N. J. L. 469.

****8 How. 134; Conover v. Walling, 15 N. J. Eq. 173.

*****Springer v. Drosch, 32 Ind. 486; Douglass v. Dunlap, 10 Ohio, 162; Harvey v. Varney, 98 Mass. 118; Beebe v. Saulter, 87 Ill. 518; Maher v. Swift, 14 Nev. 324; Butler v. Moore, 73 Me. 151; 66 Wis. 457.

is no fraud that will entitle creditors to object to the transfer of property.* But a voluntary conveyance with intent in the donor to defraud creditors is void, though the donee had no notice or knowledge of such intent; while if the conveyance had been upon consideration the rule would be different.** So while a voluntary conveyance or gift made by one not indebted at the time, is not *per se* void as to future creditors, it may become so if it appears that the grantor was actually indebted beyond his probable means of payment, or that he had formed the actual intention to defraud subsequent creditors. The existence of fraudulent intent is usually a question for the jury, the burden of proof being on the party alleging it,*** and fraudulent intent may be shown to exist though the party receiving the property paid for same, payment not being conclusive proof that the sale was *bona fide*, though undoubtedly very strong evidence of it.****

So the continued possession, use, and apparent ownership, of the vendor after an absolute sale of chattels is, either: 1. A conclusive badge of fraud as a rule of law, such that no evidence of good faith, payment of consideration, etc., can change it; or, 2, is *prima*

*Sexton v. Anderson, 95 Mo. 373; 14 Mass. 245; 50 Mich. 13; 124 Mass. 121; 69 Ia. 47; 66 Miss. 476.

**Wise v. Moore, 31 Ga. 149; 10 Allen, 340; 66 N. Y. 374; 3 Johns. Ch. 481.

***Winchester v. Charter, 12 Allen, 606; 7 Cow. 301; 94 Mo. 621; 81 Ill. 260; 53 Ala. 197.

****Wadsworth v. Williams, 100 Mass. 126; 103 N. Y. 125; 95 Mo. 373.

facie a fraud in law, and unexplained becomes conclusive as to the title, but with explanation may become a question of fact for the jury, subject to the discretion of the court to set aside the verdict when contrary to the evidence.* But the matter is frequently governed by statute.

**Clafin v. Rosenberg*, 42 Mo. 448; *Garman v. Cooper*, 72 Pa. St. 32; 53 Vt. 57; 2 Nev. 243, and others hold the sale void; but many States formerly holding the sale void, have by statute or decision concluded that continued possession in the seller is only *prima facie* evidence of fraud, and may be rebutted. *Davis v. Turner*, 4 Gratt. 422; *Warner v. Norton*, 20 How. 460; 21 Wis. 136; 66 Tex. 613; 21 S. C. 385, and many others hold the continued possession only presumptive evidence of fraud or *prima facie*, and may be rebutted or explained.

CHAPTER XI.

RIGHTS OF THE VENDOR ON BREACH OF THE CONTRACT.

Sec. 1114. PERSONAL ACTIONS AGAINST THE BUYER, WHERE THE PROPERTY HAS NOT PASSED.—When there is a breach of the contract on the part of the vendee, and the circumstances are such that the vendor has not as yet transferred the title to the vendee, the vendor's sole remedy is an action for damages for breach of contract. While he may resell the goods, his only remedy against the buyer is for non-acceptance, and as a rule the damages recoverable, are not the full price, but the difference between the contract price and the market price of such goods at the time when the contract is broken.*

There is a difference made by the authorities in reference to the rule of damages, between a contract to sell goods already in existence, and an agreement to furnish goods not in existence at the time of mak-

*Laird v. Pim, 7 M. & W. 478; Barrow v. Arnaud, 8 Q. B. 604; Phillpotts v. Evans, 5 M. & W. 475; Todd v. Gamble, 67 Hun, 38; Homer v. Wilson, 7 Mich. 294; Railway Co. v. Heck, 50 Ind. 303. The measure of damages in this special action for refusal to accept, brought sometimes before the article is completed, is not the full price of the article, but rather the difference between the contract price and the market value at the time of delivery, as this will compensate the plaintiff for the loss of the benefits of the bargain. Hinckley v. Steel Co., 121 U. S. 264; Collins v. Delaporte, 115 Mass. 162; 49 Ill. 446; 92 Wis. 397; 40 N. H. 79.

ing the bargain. In the latter case if the vendee refuses to accept the goods, or gives notice before the completion that he will not accept, many American authorities hold that if the maker performs his contract and tenders the article as ordered to the vendee, he may recover its full value, and leave the vendee to dispose of the article as he sees fit.*

Sec. 1115. SAME SUBJECT—WHERE THE PROPERTY HAS PASSED.—When the title and possession of the goods has actually passed to the vendee, the vendor must, under the common law, recover by common counts for goods sold and delivered in a personal action, while where the title has not passed the action is a special count in *assumpsit*.**

Sec. 1116. VENDOR'S REMEDIES AGAINST THE GOODS.—But there are also remedies against the goods themselves, which the unpaid vendor may exercise, although the property or title has actually passed. When the property passes the right to possession also passes, but notwithstanding, this right is defeasible if the buyer becomes insolvent, or fails to

*Shawan v. Van Nest, 25 Ohio St. 490; Gardner v. Norris, 49 N. H. 376; Pollen v. Leroy, 30 N. Y. 459; 46 Pa. St. 177. Sufficient must be done to pass or tender title before the action for the full price will lie. Railway Co. v. Maguire, 62 Ind. 140; 83 Me. 414; 13 Wis. 67; 49 Md. 589. So the action should be for goods bargained and sold, and not for goods sold and delivered, where the delivery has not been effected. 23 N. H. 395; 100 Mass. 523; 28 Or. 386.

**Martindale v. Smith, 1 Q. B. 395; Chitty on Cont. p. 408; Bartholomew v. Markwick, 15 C. B. N. S. 711; 4 N. H. 79.

perform conditions precedent or concurrent imposed upon him by the contract. If the goods have been delivered into the actual possession of the vendee, there is no longer any remedy against them; but if the goods have not been delivered into the actual possession of the vendee, they may be in two different conditions as regards delivery:—

1. They may be in the actual possession of the vendor, his agent or bailee.

2. They may have been put in transit for delivery to the vendee, and thus not in the actual possession of either one. When the goods are thus in transit, the law gives to the unpaid vendor the right of intercepting them if he can, and prevent their reaching the *actual possession* of an insolvent vendee. This right of the unpaid vendor, long known in the law of sales, is called the right of stoppage *in transitu*. It can only be exercised when the vendee has become insolvent, or the vendor learns of the insolvency in fact during the transit.

When the goods have not left the actual possession of the vendor, his agent or bailee, the vendor has a lien for the unpaid price, except where he has agreed to sell on credit, since this agreement waives the lien, and the buyer may take possession while the credit lasts and leave the vendor to his personal action for the price. In this case, the lien being waived, by the credit given, the buyer may leave the goods in the custody of the vendor until the credit expires, and then make default in payment, or become insolvent.

The question then arises whether the vendor's lien revives on the ground that the waiver was conditional, or can the vendor exercise a *quasi* right of stoppage before transit? The extent of the vendor's rights in this intermediate state of affairs has not been exactly defined, but there are authorities which seem to approve the following rules:

1. If the question arises as between the unpaid vendor and the insolvent buyer, the vendor may refuse to give up the goods without payment. He has a lien on them for the price.

2. The vendor's remedy by lien is not impaired by his giving an order for the delivery of the goods stored in a warehouse, or in other bailment, if the order is countermanded before the vendee secures the assent of the bailee to his possession, that is, before the bailee attorns to the buyer.

3. If the controversy be between the unpaid vendor and a sub-vendee or pledgee, the vendor may retain possession, unless he has transferred to the buyer a bill of lading or other document of title to the goods, which the buyer has lawfully transferred for value to the claimant. If no such title has been transferred, and no assent, express or implied, on the part of the vendor been given to the sub-sale or pledge, the vendor's lien will prevail.

4. The vendor may assent to the sale to the sub-vendee before it takes place, either by language or conduct, but such assent is not to be implied from a

document given the buyer other than a document of title, unless it contains statements of facts creating an estoppel.*

While the unpaid vendor has a lien for the price, and a right of stoppage *in transitu*, the failure to pay the price does not rescind the contract, unless that is the express agreement. (*Martindale v. Smith*, 1 Q. B. 395.)

Sec. 1117. SAME SUBJECT—LIEN.—A lien is defined by Mr. Benjamin as “a right of retaining property until a debt due to the person retaining it has been satisfied.”** Liens may be either, express, or implied. A lien is always implied, where nothing is said to the contrary, in a sale of goods, until the payment of the price, and unless it is waived the buyer cannot get possession without payment.***

The contract may show that no lien was contemplated between the parties, or it may be abandoned during the performance of the contract.**** The vendor waives his lien when he takes a bill of ex-

*Benj. Sales, Sec. 799, citing, *Valphy v. Oakley*, 16 Q. B. 941; *M'Ewan v. Smith*, 2 H. L. C. 309; *Craven v. Ryder*, 6 Taunt. 433; *Merchant Banking Co. v. Steel Co.*, 5 Ch. D. 205; 2 Sm. L. C. p. 829.

*Benj. Sales, 196; *Conrad v. Fisher*, 37 Mo. App. 352; 55 N. J. L. 324.

****Arnold v. Delano*, 4 Cush. 33; *Safford v. McDonough*, 120 Mass. 291; *Perrine v. Barnard*, 142 Ind. 448; *Bohn Mfg. Co. v. Hynes*, 83 Wis. 388.

*****Pickett v. Bullock*, 52 N. H. 354; *Re Batchelder*, 2 Low. 245; *McElwee v. Lumber Co.*, 69 Fed. Rep. 302.

change and gives receipt for the price, and when he delivers the goods to the buyer he abandons it.*

Where the goods at the time of the sale are in the possession of a third person, the lien is lost as soon as the vendor, buyer and third person agree together that the third person shall cease to hold for the vendor and hold possession for the vendee. So for the purpose of a lien, the delivery of goods to a carrier for delivery to the buyer as such, will put an end to the vendor's lien, but not to his right of stoppage *in transitu*. A lien, however, is not divested by merely marking the goods in the name of the buyer, or setting them aside for him, or by boxing them up and putting the purchaser's name on the boxes. But the lien will be divested if the vendor delivers to the vendee the *evidence of property or title*, as a bill of lading, and in some states, the warehouse receipt for the goods.**

If only part of the goods be delivered, the lien is not divested, and attaches to the residue for the whole price.*** So where a delivery order has been given by the vendor to the buyer on a warehouseman, the

*Thompson v. Wedge, 50 Wis. 42; Gregory v. Morris, 96 U. S. 619; Freeman v. Nichols, 116 Mass. 309; Bank v. Walbridge, 19 Ohio St. 424; 66 N. Y. 113; but the taking of a note for the price, does not destroy the lien if possession remains in the vendor, and he is ready to return the note, especially if the buyer becomes insolvent. (4 Cush. 33; Milliken v. Warren, 57 Me. 46; 19 N. H. 419.

**Davis v. Russell, 52 Cal. 611; Allen v. Jones, 24 Rep. 11; 40 Ill. 320; Benj. Sales, 807.

***Dixon v. Yates, 5 B. & Ad. 313; Miles v. Gorton, 2 Cr. & M. 504; Buckley v. Furniss, 17 Wend. 504; 128 Mass. 104; 13 Johns. 434.

vendor may, before actual possession is taken by the buyer, or some innocent purchaser of the order has intervened, revoke the order and restore his right to lien.*

Sec. 1118. SAME SUBJECT—RESALE.—Where the buyer has notice to take away the goods and pay the price, but does not do so, can the vendor resell the goods, or must he hold them, obtain a judgment and sell them on execution? Mr. Benjamin states the rule to be in England, that while the lien amounts to more than a mere right to hold the goods, yet it does not amount to a "complete resumption of the right of property, or, in other words, to a right to rescind the contract of sale, but perhaps comes nearer to the rights of a pawnee with a power of sale, than to any other common law rights. At all events, it seems that a resale by the vendor, while the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain, and so entitle the purchaser to sue in trover."**

The right of resale on default of the buyer to make payment, and to recover the difference between the proceeds and the original contract price is quite gen-

*Keeler v. Goodwin, 111 Mass. 490; Anderson v. Reed, 106 N. Y. 333.

**Benj. Sales, Sec. 782; Blackburn on Sales, p. 325.

erally admitted in America.* Of course the sale must be fairly made, and within a reasonable time in order to furnish a conclusive test of the vendor's damages against the vendee. It is usual to give notice to the buyer of the time and place of sale, or at least inform the buyer that the vendor intends to exercise the right of sale. But such notice is not held to be absolutely necessary in the cases.** The sale being fairly made, the amount obtained is applied upon the purchase price and the vendor may recover the difference between this amount and the original contract price from the vendee by action. The necessary expenses of the sale is also to be deducted from the amount realized, but not expenses of storage and the like after the property could have been sold.***

Sec. 1119. SAME SUBJECT—STOPPAGE *in transitu*.—The right of stoppage *in transitu*, which the unpaid vendor may exercise, never arises except upon

*Haines v. Tucker, 50 N. H. 313; Shawhan v. Van Nest, 25 Ohio St. 490; Sands v. Taylor, 5 Johns. 395, a leading case; Mason v. Decker, 72 N. Y. 599; Holland v. Rea, 48 Mich. 218; Bagley v. Findley, 82 Ill. 524.

**Maulding v. Steele, 105 Ill. 644; Lindon v. Eldred, 49 Wis. 305; Smith v. Pettee, 70 N. Y. 13; Saladin v. Mitchell, 45 Ill. 79; Rosenbaums v. Weeden, 18 Gratt. 785; Clore v. Robinson, 38 S. W. Rep. 687.

***5 Johns. 395; Lewis v. Greider, 51 N. Y. 231; Whitney v. Boardman, 118 Mass. 242; Chalmers v. McAuley, 68 Vt. 44; Rickey v. Ten Broeck, 63 Mo. 567. If the goods should bring more than the price of the original contract the buyer derives no benefit from it, the increased profit goes to the vendor; but the buyer can show in an action for damages that the breach has caused no loss to the vendor.

the insolvency of the buyer, and is based on the rule that one man's goods shall not be applied to the payment of another's debts.*

This right of the vendor, on the insolvency of the buyer, is almost universally recognized among commercial nations. It seems that it may be exercised by the vendor or his agent, and those who stand in the relation of vendors or consignors, especially where the bill of lading has been transferred by the vendor to his agent.**

There must be three parties in order to exercise the right of stoppage *in transitu*,—a vendor, a vendee, and a middleman, such as a carrier, having possession of the goods. The goods must be in the possession of a third person, since if they come into the actual possession of the vendee the vendor loses the right.***

While the right of stoppage *in transitu* may be exercised by others than the vendor, and without authority from him, yet if the vendor does not ratify the act before the transit ends it will be ineffective. And, generally, persons having merely liens on the goods and

*Gibson v. Carruthers, 8 M. & W. 337, giving a history of the right, as originally allowed in equity, and subsequently adopted as a rule of law.

**Feise v. Wray, 3 East, 93; Morison v. Gray, 2 Bing. 260; Seymour v. Newton, 105 Mass. 275; 13 Me. 93; Gossler v. Schepeler, 5 Daly, 476; 85 N. C. 429.

***Poole v. R. R. Co., 58 Tex. 134; Stevens v. Wheeler, 27 Barb. 658; Secomb v. Nutt, 14 B. Monr. 324; 106 Mass. 67; 60 Ia. 108; 160 Pa. St. 527; Guilford v. Smith, 30 Vt. 49; Covell v. Hitchcock, 23 Wend. 611.

not the owners, or in the relation of owners, cannot stop goods in transit under this right. (123 Mass. 12.)

This right of the vendor exists notwithstanding the partial payment of the price; is neither lost by his having received conditional payment, as bills of exchange or other security, or having given credit and the like.* As regards notes and bills of exchange it is held that even if the vendor negotiates the bills and they are outstanding in third persons' hands, he has still the right of stoppage if the notes are not matured.**

But a vendor who has received securities in absolute payment of the price has no right of stoppage *in transitu*. He has no further remedy against the goods but must look to the securities. (32 Vt. 58.)

By insolvency, is meant the general inability to pay one's debts. It is probable that the failure to pay one's just debts would be sufficient evidence of insolvency to require the vendee against whom it was charged to show that he was not insolvent. The vendor must have some evidence of the insolvency of the buyer before he can exercise the right of stoppage *in transitu*. If the vendor stops the goods when the vendee is not in fact insolvent, he does so at his peril, and thereby becomes liable in damages to the vendee for the loss sustained by him.***

*Eaton v. Cook, 32 Vt. 58; Stubbs v. Lund, 7 Mass. 453; Clapp v. Sohmer, 55 Ia. 273; Buckley v. Furniss, 17 Wend. 504; Newhall v. Vargas, 13 Me. 93; 20 N. H. 154.

**Benj. Sales, 835; 4 Cush. 33.

*Benj. Sales, Sec. 837-8; Biddlecombe v. Bond, 4 A. & E. 332; Clapp v. Sohmer, 55 Ia. 273; 38 Mich. 674; 43 N. H. 580; 63 Ala. 243; 12 Ohio St. 515.

Sec. 1120. WHEN DOES A TRANSIT BEGIN AND END?—The transit is held to continue from the time the vendor parts with the possession until the purchaser acquires it. That is, from the time the vendor has so far made delivery that his right to retain the goods and right of lien for the purchase price are gone, to the time when the goods have reached the possession of the buyer, or his assignee. The goods are subject to stoppage as long as they remain in the possession of the carrier as a carrier. But where the buyer sends his own agent or servant for the goods, delivery to such servant or agent is delivery to the buyer, and the right is ended. So if the buyer sends his own conveyance or vessel, they have reached his possession as soon as the vendor has delivered them into the conveyance or vessel.*

Goods may be still in transit although lying in a warehouse to which they have been sent by the vendor on the purchaser's order. The test for determining whether the transit is ended is in what capacity is the goods held by him who has them in custody. Where the goods have reached their destination, and the question arises whether they remain in the hands of the carrier, as a carrier, or in some other capacity. The rule is that where the carrier is also a warehouseman and may have the goods as a carrier on deposit in his

*James v. Griffin, 2 M. & W. 633; Blackburn on Sale, 242; 14 B. Monr. 324; 17 N. Y. 249; 30 Pa. St. 254. The vendor may restrain the delivery to the vendee on his own vessel by taking a bill of lading in the name of the captain as bailee.

warehouse, or in the warehouse independent of the carriage and subject to the order of the buyer, the buyer and carrier must agree before the carriage is terminated and the carrier becomes the bailee of the buyer.*

The question is one of intention, and if the vendor shows that he intends to abandon the goods to the carrier as agent for the vendee, the right of stoppage *in transitu* is ended. So the buyer may anticipate the end of the transit, and put an end to the right of stoppage, by getting possession of the goods by an agreement with the carrier.** So the *bona-fide* sale for a valuable consideration, accompanied with an assignment and delivery of the bill of lading, before the termination of the transit defeats the right, and this whether the consideration be cash or an antecedent debt.*** If the vendee had been guilty of fraud the sale would not be effective.**** But a mere sale by

*Blackburn on Sale, p. 248; Whitehead v. Anderson, 9 M. & W. 529; 57 N. H. 454; 60 Ia. 108; 58 Minn. 464; 8 Pick. 198; Calahan v. Babcock, 21 Ohio St. 281; 35 Kans. 310; 50 Miss. 591; 13 Wis. 79; 93 Wis. 250. Ordinarily where goods are in the carrier's warehouse at the end of their journey, and the freight or other charges have been paid by the vendee, the possession of the party is regarded as that of an agent for the buyer, and the right of stoppage *in transitu* is at an end. Hall v. Dimond, 63 N. H. 565; Williams v. Hodges, 113 N. C. 36; 40 Ia. 627.

**14 B. Monr. 324; 106 Mass. 72.

***51 Cal. 345; 32 Barb. 490; Lee v. Kimball, 45 Me. 172; 24 N. Y. 638. But not if the assignment is merely collateral security for a pre-existent debt. 63 Ala. 243.

****Rosenthal v. Dessau, 11 Hun. 49; 85 Ind. 457; Pollard v. Vinton, 105 U. S. 7; 55 N. Y. 456.

the vendee, without the vendor's consent, and unaccompanied by actual or constructive possession does not defeat the right.*

The mere arrival of the goods at the place of destination will not necessarily operate to defeat the vendor's right, but the vendee must take actual possession. What amounts to actual possession will depend upon the circumstances. Delivery of part of the goods will not operate as a delivery of the whole so as to discharge the right of the vendor, unless it is shown that it was so intended. If the goods are actually delivered to the buyer or the assignee of the buyer, this puts an end to the right of stoppage *in transitu*.*

Sec. 1121. HOW THE RIGHT IS EXERCISED.—There is no particular mode or manner by which the seller is bound to exercise the right of stoppage *in transitu*. Any means which he uses to get the goods which is not criminal will be sufficient. The usual mode is by notice to the carrier or third person, forbidding him to deliver to the buyer and requiring that the goods be held for the vendor. If the carrier delivers to the vendee, when he should not, he is liable to the vendor, and if he withholds delivery from the vendee when he should deliver he is equally liable to

*Engine Co. v. Oliver, 166 Neb. 612; Holbrook v. Vose, 6 Bosw. 77.

**57 N. H. 454; 160 Pa. St. 527; 20 Vt. 172; Crawshay v. Eades, 1 B & C. 181; Tanner v. Scovell, 14 M. & W. 28; Benj. Sales, Sec. 857.

the vendee.* The notice to withhold delivery must be given to the one in possession of the goods, and on behalf of the vendor.**

Sec. 1122. HOW THE RIGHT MAY BE DEFEATED.—The vendee being in possession, with the consent of the vendor, of a bill of lading, or other document of title to the goods, may, by transferring the same to a third person, who *bona fide* gives value for it, defeat the right. At the common law the right was defeasible when the bill of lading was transferred to a *bona fide* indorsee other than factors and consignees; but by the Factor's Act in England, the common-law rule was extended to factors and consignees, who previously had to be the bona-fide purchasers of the goods in order to divest the vendor of his right of stoppage.***

Sec. 1123. THE EFFECT OF STOPPAGE *in transitu*.—The exercise of the right of stoppage *in transitu* is only an extension of the right of lien, given by the common law to every unpaid vendor before the goods leave his possession. It does not rescind the contract, but simply restores the goods to the possession of the vendor, and the vendor has the same right to recover the price by resale or suit at law as before

*7 Taunt, 169; 43 N. H. 580; 105 Mass. 272; 5 Denio, 629.

**5 Denio 629.

***Benj. Sales, Sec. 862-3; Lickbarrow v. Mason, 1 Sm. L. C. 137; 13 Ch. Div. 628; 45 Me. 172. It does not matter that the purchaser knows the goods have not been paid for.

****Newhall v. Vargas, 13 Me. 93; 20 Conn. 53; Wentworth

the stoppage.**** So if the price is subsequently tendered by the vendee before resale, the vendor must give up the goods, though enhanced in value.* The vendor may, in some cases, sell the goods after stoppage and give a good title as against the creditors of the vendee.**

v. Outhwaite, 10 M. & W. 436; L. R. 2 Ch. App. 332; 44 N. Y. 661; 80 N. Y. 244.

*12 Pick. 313; 13 Me. 93; 126 Pa. St. 485; 10 Tex. 2.

**Tuthilly v. Skidmore, 124 N. Y. 148; *Hamburger v. Rodman*, 9 Daly, 93.

CHAPTER XII.

RIGHTS AND REMEDIES OF THE BUYER.

Sec. 1124. RIGHTS AND REMEDIES OF THE BUYER FOR BREACH OF CONTRACT.—The breach of contract of which the buyer may complain may arise from the vendor's default in delivering the goods, or from some defect in the goods when delivered. The buyer's right to avoid the contract for fraud, mistake and failure of consideration and the like has already been considered, and we are now to discuss his rights and remedies for breach before obtaining possession of the goods, both where the contract is executory and where it is executed and title has passed, and also his remedies after getting actual possession of the goods from the vendor.

Sec. 1125. REMEDIES BEFORE OBTAINING POSSESSION, WHERE THE CONTRACT IS EXECUTORY.—Where the contract is executory the property or title in the goods does not pass to the buyer, and his remedy for the failure of the vendor to carry out the agreement, is for damages for the breach, and is the same as that which exists for the breach of any contract. The damage which may be recovered is the difference between the contract price and market price at the time and place of the proposed delivery of the goods.*

*Barrow v. Arnaud, 8 Q. B. 604; Collins v. Delaporte, 115

Where there are other circumstances in the contract which the rule as to the market price does not cover, it is said that the damages which may be recovered are such as may fairly be supposed to have been in the contemplation of the parties at the time the contract was made, and what this was, will be a matter for the jury to determine.*

Sec. 1126. SAME SUBJECT—WHERE THE CONTRACT IS EXECUTED AND TITLE HAS PASSED.—Where the property has passed to the vendee in an executed contract, though the buyer has not obtained possession, he is entitled to possession because of his title and ownership of the goods. In this case the buyer has still his right of action for breach of contract to deliver, and this was formerly his only remedy. But now he may also maintain an action of trover or conversion on refusal of the vendor to deliver the goods. That is, the buyer may treat the contract as if the title were still in the vendor and sue for the breach of the contract, or consider the title as in himself and sue in trover for the conversion of the goods. There is some diversity of opinion upon this question in the United States, but the weight of authority seems to be that the buyer cannot waive the tort and sue in assumpsit unless the goods have been actually sold or parted with by the vendor. In such

Mass. 162; 49 Ill. 446; 13 Wis. 67; *Hadley v. Baxendale*, 9 Ex. 341.

**Griffin v. Colver*, 16 N. Y. 489; *Sedgwick on Damages*, vol. 1, p. 233.

a case the damages is the money received by the vendor, subject to a counter-claim on the part of the vendor for the price. (Beni. Sales, Secs. 884-886.)

Sec. 1127. REMEDIES OF BUYER AFTER RECEIVING POSSESSION.—After the buyer has actually received the goods into his possession, the performance of the vendor's duties may be incomplete, either by the breach of warranty of title, or breach of warranty of quality. Where the breach is for a warranty of quality, as a general rule, because of the maxim, *caveat emptor*, the warranty must be express. In these cases the buyer has the choice of three remedies:—

1. He may refuse to accept the goods and return them. 2. He may accept the goods and bring an action for breach of warranty. 3. He may wait until he is sued for the price of the goods, and then set up the breach of the agreement under which he purchased the articles, and thus reduce the price by counter-claim for damages.*

If the buyer intends to rely upon a defect in the quality of the goods, he should be careful to give notice to the vendor and offer to return them; but this does not affect the legal aspect of the right, since if the defect exists it may be shown, but the failure to

*Mondel v. Steel, 8 M. & W. 858; 105 Mass. 17; 108 Mass. 573; 115 U. S. 363; 42 Mo. App. 313; Hoadley v. Huse, 32 Vt. 179; 88 Me. 504; 53 Ia. 399; 89 Ia. 400; 50 Minn. 261.

give notice to the vendor might create a presumption or inference that the complaint as to quality was not well founded. (67 Me. 78; 97 Ia. 148.)

Where there is an agreement on the part of the vendor to take back the goods if they prove defective, they must be returned as soon as the fault is discovered. If there is a remedy agreed upon, as that the vendee may return the goods, it is doubtful whether he has any other remedy for the breach of warranty as to quality.*

The general rule of damages in actions upon a warranty is the same as that for the breach of the vendor to deliver, that is, the difference between the value of the article delivered, and the article as it was represented to be, or as it is otherwise stated, the value of an article corresponding to the warranty, minus the value of the article actually received and kept, and not necessarily the difference between value of the article received and the price actually paid for it, since the buyer is entitled to the profits if he purchased it for less than its real value.**

So the buyer may recover special or consequential damages for a breach of warranty, as the loss occa-

*2 H. Bl. 573; 79 Ia. 101; Bomberger v. Griener, 18 Ia. 477; some cases hold that action for breach may be maintained though vendor expressly agreed to take back the property for defects, 10 Cush. 88; 21 Minn. 391; 50 Minn. 261; 56 Conn. 289. These cases hold the right to return as merely a cumulative remedy

**Brown v. Sharkey, 93 Ia. 157; Rutan v. Ludlam, 29 N. J. L. 398; Clothiers v. Keever, 4 Pa. St. 168; 42 Conn. 9; 2 Allen 52.

sioned by reason of the defect in the article, the profit that might have been made if the article had been according to agreement, if they can be clearly shown by evidence to be the natural results of the breach of warranty.* But mere contingent or speculative gains or losses cannot be recovered, since it cannot be definitely ascertained whether they would or would not have resulted.**

It is a general rule that a purchaser of personal property cannot maintain a bill in equity for specific performance of the contract, since he has usually a full and complete remedy at law. But there are a few cases in which the courts allow the buyer to secure specific performance by bill in equity on the ground that his remedy at law is not plain or adequate. Thus to secure the return of surveyor's maps, plans and papers the bill was allowed; to enforce the assignment of patent rights, to secure heirlooms, and articles which the vendor alone can supply.***

*Oldham v. Kerchner, 81 N. C. 430; Griffin v. Colver, 16 N. Y. 489; 40 N. Y. 422; Swain v. Schieffelin, 134 N. Y. 471; Thoms v. Dingley, 70 Me. 100; Love v. Ross, 89 Ia. 400; Ferris v. Comstock, 33 Conn. 513; Jones v. George, 61 Tex. 345.

**Goodell v. Lumber Co., 57 Ark. 203; Herring v. Skaggs, 62 Ala. 180; McCormick v. Vannatta, 43 Ia. 389.

***McGowin v. Remington, 12 Pa. St. 56; Somerby v. Buntin, 118 Mass. 287; Williams v. Howard, 3 Murphey, 74; Hapgood v. Rosenstock, 23 Fed. Rep. 86; 46 N. J. Eq. 477; 91 Pa. St. 434; 115 Mass. 244; 74 Wis. 591; 108 Ill. 195.

EQUITY OR CHANCERY JURISPRUDENCE.

CHAPTER I.

THE SUBJECT INTRODUCED AND DEFINED.

Sec. 1128. HISTORY OF THE COURT OF CHANCERY.—While the origin of courts and tribunals for the administration of justice in any particular nation usually antedate the history of a nation, the origin and history of the court of chancery is an exception, and is fully covered by recorded history, so that we may trace its development with great accuracy.

Among the Germans and Anglo Saxons all legislative, executive and judicial power was at first exercised by the people of each particular community meeting together on stated or special occasions, but the advent of kings and the growth of the principle of royal authority curtailed many of the rights of the people. The Anglo Saxon kings perhaps never assumed the prerogative of sitting in a judicial capacity, and permitted justice to be administered by local courts in the several counties, towns and districts, with one general or superior court, with civil and spiritual

jurisdiction, known as the *Wittena-gemote*, or assembly of the wise, which body acted not only in a judicial, but also in a quasi-legislative capacity.*

After the Norman conquest, and the introduction of the feudal doctrines, the king came to be regarded as the *fountain of justice*, and did actually at first, and later, in theory, sit as the highest court to administer justice.** But it was early established, that while the king might sit in the court, and in theory was presumed to be always present and speaking by the mouths of his judges, yet he was there as king, and not as judge.***

During the Norman period the "wittena-gemote" of the Anglo-Saxons became the *Curia Regis*, or king's court. It differed from a modern court, and its various members composed several distinct counsels acting as advisory or quasi-legislative bodies to the king. The *Concilium Privatum*, or Select Council, a part of this general council, was composed of the great officers of the state, nominated from the nobility by the king and sworn into office. This body advised with the king upon all important state matters, and in a modified form still exists to-day, and is known as the *privy council*.****

The judicial business coming before the *Curia Regis* was ordinarily referred to one of three permanent

*3 Bl. Com. 37; 1 Madox Hist. of the Ex. 92.

**4 Inst. 7; 1 Spence Eq. Jur. 330.

***12 Rep. 63.

****The Lord's House in Parliament, Hale, 4, 13; 1 Eq. Jur. 328; 3 Bl. Com. 36-38,

committees, afterwards known as the courts of Exchequer, Common Pleas, and King's Bench. The court of Exchequer assumed jurisdiction of all matters pertaining to the revenues, the court of Common Pleas of all civil disputes, in which the interest of the king was not involved, and the court of King's Bench, of all crimes and other matters not falling within the jurisdiction of either one of the other courts.*

Under this system one of the principal officers of the kingdom was the Chancellor. He was, probably, at first, the king's private secretary, but at a very early date became invested with many judicial powers and was given a general superintendency over the other officers of state, and had the custody of the king's *great seal*.**

*The Lord's House in Parliament, Hale, 51, 55; 3 Bl. Com. 44-45.

***"The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor or *cancellarius*; who, Sir Edward Coke tells us, is so termed *a cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction. But the office and name of chancellor, however derived, was certainly known to the courts of the Roman emperors, where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established

The Chancellor was a member of the *Curia Regis* and of the *Concilium Privatum* and, by virtue of his office, exercised certain common law judicial powers. Thus he had authority to repeal letters patent granted by the king; to hear petition of right against the crown; and to hear and determine all personal actions to which the king or his officers were parties, and especially to issue all writs by which all common law actions were commenced. The Chancery, that is, the Chancellor's court, was therefore a common law court, or branch of the judicial system of England from the earliest times.*

The Chancellor exercised very important functions aside from these common law powers, as he was at first usually a Bishop, or some other church dignitary, and became the king's spiritual adviser. Owing to his confidential relations with the king, and his priestly character, all matters which required the king to in-

upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner, and, therefore, when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper whose authority by statute 5 Eliz. c. 18, is declared to be exactly the same, is with us at this day created by the mere delivery of the king's great seal into his custody."—3 Bl. Com. 46-7; 4 Inst. 88; Gibb. Decl. & Fall., 2, 99; 1 Camp. Lives of The Chancellors, 2.

*3 Bl. Com. 46-48; Com. Dig. Chancy. A, 1, 2; Spence Eq. Jur. 336; Bacon's Abridg. "Ct. of Chy." B.

tervene and prevent any hardship which might be occasioned by the strict enforcement of the rules of the common law courts were naturally referred to the Chancellor, and he thus came to be called the *keeper of the king's conscience*. And later by a royal order all matters of "grace," that is, special application to the king for equity, were directed to be prosecuted before the Chancellor or keeper of the great seal*

The chancellor and his assistants acted as clerks for the common law courts. All actions in the law courts were commenced by the issuing of an original writ, which writs were framed by the chancellor's clerks, afterwards called masters in chancery, and issued out of the chancery in the name of the king and under his great seal. The writ was directed to the sheriff of the proper county, requiring him to command the defendant to right the wrong set forth in the writ or to appear in one of the common law courts and answer for his default.**

While the clerks of the chancery issued the writs and drafted them from the facts presented by suitors for justice, the law judges had exclusive authority to pass upon their sufficiency, as well as what would constitute a defence to each cause of action. From their adjudications the form of the writs that might

*1 Madox Hist. Ex. 60; Hargreave's Law Tracts, 427. Blackstone states the common law functions of the Chancellor to be of earlier origin than his equity jurisdiction. 3 Bl. Com. 47-8.

**1 Spence Eq. Jur. 238; 3 Harv. Law. Rev. 97; 1 Madox Hist. Ex. 85-6.

be issued by the clerks became fixed and rigid, and while ordinary actions had a corresponding writ, causes of action arose for which there was no writ, and the common law courts refusing to allow the old writs to be modified to meet the emergency it was necessary for parliament to attempt to remedy the matter by statute, and by the statute of Westminster II. (13 Edw. I. Chap. 24) it was provided that the clerks of the chancery might issue a writ in a new case, and if they failed to agree upon one, they should refer the matter to the next parliament, where one might be framed.* This statute gave to the chancery, or clerk's office of the law courts, three new writs, *trespass on the case*, *trover* and *assumpsit*, and then it failed. And they are sometimes called the equitable actions of the law, from the fact of their being broader and more liberal than the other common law writs.**

In the reign of Edw. III. (1327-1377), the court

*1 Spence Eq. Jur. 325; 3 Bl. Com. 51.

Actions at law at this time were divided into two general classes; first, Real Actions; second, Personal Actions. Real actions were brought to determine the right to and the possession of the various estates in land, and all these proceedings were exceedingly technical, both in form and procedure. Personal actions were divided into two classes, *ex contractu* and *ex delicto*. And it necessarily happened that there were a great many applicants whose cases did not fall within the ground covered by any writ, and which were still meritorious and appealed to the conscience of the king. Undoubtedly at first the king or the Chancellor gave personal attention to such cases and saw that substantial justice was done.

**3 Bl. Com. 51; 1 Spence Eq. Jur. 326.

of chancery had assumed jurisdiction to give relief in cases not cognizable by the law courts and requiring extraordinary remedies, and in the 22nd year of Edw. III., by ordinance all matters of equity or grace were referred to the Chancellor or keeper of the great seal.*

After this ordinance of Edward III., and the assumption of separate jurisdiction by the chancery, suits in equity were instituted by bill addressed to the chancellor. This bill was from a very early period written in English and hence was called an English bill, while the proceedings in the common law courts were in Latin. The earliest bill of which we have any record was filed in the reign of Henry V., and was written in law French.**

The bill addressed to the chancellor contained a simple statement of facts upon which relief was predi-

*1 Madox, 62; 1 Story, Eq. Jur. Sec. 44n; Rex. v. Hare, 1 Strange, 150; Pomeroy, Eq. Sec. 1; Bispham, Prin. Eq. Intro-Chap.

"But when, about the end of the reign of King Edward III., uses of lands were introduced, and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established; and John Waltham, who was bishop of Salisbury and chancellor to King Richard II., by a strained interpretation of the above statute of Westm. 2, devised the writ of *subpoena*, returnable in the court of chancery only, to make the feoffee to uses accountable to his *cestuy que use*; which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions."—3 Bl. Com. 51.

**Hals v. Hynchly, 1 Law Quar. Rev. 443; 3 Bl. Com. 442.

cated. At first, the chancellor, after a personal examination of the bill, if he found the case meritorious, issued a *subpoena* requiring the defendant to appear before the court of chancery and answer. Afterwards the chancellor required every bill to be signed by the solicitor who prepared it, and relying upon his judgment a *subpoena* was issued as a matter of course. The writ of *subpoena* is said to have been invented by John Waltham, master of the rolls, in the fifth year of the reign of Richard II. It obtained its name from the fact that it commanded the defendant to appear and answer the complainant, and abide the order of the court under a certain penalty (*subpoena*) therein inserted. In case the defendant neglected or refused to appear he was proceeded against for contempt.*

Not only did the court of chancery proceed in a different manner in the commencement of suits, but the relief which it afforded was more ample and complete than the law courts could give. And this latter circumstance tended materially to increase the number of suitors in chancery. The machinery of the common law courts to either prevent wrongs or compel parties to carry out their agreements was defective. The remedy for a breach of contract at common law was a judgment for damages, but the court of equity could compel the defendant to fulfil his engagement by decreeing specific performance. So the law courts were powerless in most instances to prevent a threatened wrong, but the chancery by injunction could re-

*3 Bl. Com. 51, 443; 1 Spence Eq. Jur. 338, 345, 369.

strain the defendant from committing the injury intended. Again, in the law courts a judgment was enforced against the property of the defendant, that is, they acted *in rem*, while the chancery court acts *in personam*, or against the person. And in the troublous times of Richard II., the chancery protected the poor and weak against the rich and powerful, assuming in some cases criminal jurisdiction.*

The court of Chancery did not like the law courts sell justice. In those early times one of the principal revenues of the crown was derived from the sale of justice, or, more accurately, perhaps, from a sale of the means of procuring justice. Every step in a law suit had to be purchased with a fine, or what we should now call costs. The suitor must pay for his writ; for the privilege of pleading certain facts; to hasten the trial; to hasten judgments, and for the collection of the judgment. Some of these amounts were very considerable, and it might easily happen that the fines paid the king, together with the attorney's fees, would deter one from bringing a suit at law.**

*Spence Eq. Jur. 344, 353n, 685. Another important difference between the two courts existed in the method of taking proofs. At law no person in interest could testify, nor could the plaintiff compel the defendant to be a witness; while in chancery the defendant could be compelled to answer the complainant's bill under oath, and specifically answer the interrogatories therein contained, and if the defendant desired to obtain the complainant's testimony he could do so by cross-bill. 3. Bl. Com. 382, 437, 446.

**Madox, in his history of the Exchequer, classifies these court fines as: 1. Fines to have justice and right; 2. fines for

Under Lord Ellesmere (1616), an able chancellor, the practice of the court of chancery in enjoining the collection of judgments and proceedings at law was stoutly resisted by the law courts with Sir Edward Coke, then chief justice of the king's bench, as their chief backer, with the result that the matter was referred to the king and counsel, and they decided in favor of the equity court.* A similar conflict between the law and equity courts arose in this country in New York in 1809.**

Under a succession of able chancellors the jurisdiction of the equity court became firmly established, and its method of procedure uniform and complete, and so it existed in England side by side with the law courts until 1873, when the passing of the Judicature Acts united the two systems of courts into one supreme court, of which chancery became a division.***

writs, pleas, trials and judgments; 3. fines for expedition of pleas, trials and judgments; 4. fines for delay thereof; 5. fines payable out of the debt recovered.—Chap. 12.

*"This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the council, and even a master in chancery, for having incurred a *præmunire*, by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition.—3 Bl. Com. 53-54; Camp. Lives Ld. Chancellors, Chap. 48; Courtney v. Glenville, Cro. Jac. 343; Earl of Oxford's Case, 2 White & Tudor, 642; 8 Swanst. 22n.

**Re Yates, 2 Johns. 317; Yates v. Lansing, 5 Johns. 282; 9 Johns. 395.

***36 & 37 Vict., c. 66; 25 Am. Law Rev. 1; 10 Harvard Law Rev. 442; Kerly, Hist. of Eq p. 273.

Sec. 1129. **EARLY HISTORY OF CHANCERY IN THE UNITED STATES.**—The American colonies were settled during the most influential period of the chancery court in England, and it, along with other serviceable institutions of the mother country, became engrafted on the judicial system of the various colonies. In most of them the equity powers were exercised by the royal governor in conjunction with his council, while in Rhode Island, during the colonial period, the assembly acted as a court of chancery. In all of the colonies, except Pennsylvania, the chancery existed as a distinct tribunal from the common law courts. In Pennsylvania equity was administered by the law courts and, according to the procedure of the common law, until the middle of the present century. When the colonies became States, they either established separate courts of equity, presided over by chancellors, or conferred the equity powers upon the ordinary law courts with a provision for its exercise according to the forms and procedure of chancery. The Pennsylvania experiment affording a connecting link between the early plan of a chancery court and that which now commonly exists in the United States.*

Sec. 1130. **STATUS OF CHANCERY IN THE UNITED STATES AT PRESENT.**—As a result of the adopting of the Code system, and the unification of the various actions into a single action under that

*Wilson, Cts. of Chan. in America, 18 Am. Law Rev. 233-6; Wells v. Pierce, 27 N. H. 512; Pomeroy Eq. Jur. (2d ed.), Sec. 338.

system, the American states and territories may be divided into three groups as regards the method followed of administering equity jurisprudence. These are:—

First. Those states in which separate courts of chancery are maintained, and law and equity are administered by distinct tribunals under different modes of procedure. In this group the chancery court is copied after the Court of Chancery in England, and is similar as to powers and jurisdiction. This group includes Alabama, Delaware, Mississippi, New Jersey and Tennessee.*

Second. Those states in which law and equity are still administered in their district and appropriate forms, but by the same court. The boundaries between the two as to jurisdiction being jealously guarded, and the chancery jurisdiction not ceasing because the statutes confer the same powers on the law courts.** The most important member of this group is the federal government of the United States, comprising the various federal courts, which follow the system uniformly and are not influenced by state legislation.*** The states belonging to this group are, Arkansas, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Mex-

*Am. & Eng. Encyc. Law (2d ed.), Vol. 11, p. 154; Barton's Suit in Eq. 22; Bispham's Prin. Eq. (5th ed.), Sec. 15.

**Barton's Suit in Eq. 23; Bispham, Prin. Eq. 25; Byrd v. Jones, 84 Ala. 336; McClain v. Smith, 158 Pa. St. 49; 35 W. Va. 167.

***Livingstone v. Story, 9 Pet. 632; 150 U. S. 202.

ico, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia.

Third. This group includes the states and territories which have adopted the Civil Code. In these the distinction between actions at law and suits in equity is abolished, and all relief is said to be administered through the uniform procedure of a civil action. The effect of this is not, however, to abolish entirely the distinction between law and equity, though affording a common method of administration. The fundamental principles of equity are regarded, and it is even quite common to refer to actions involving equity principles as equitable actions, as distinguished from law actions. The abolition of the distinction between suits in equity and at law as made by the Codes does not allow of the bringing an action not previously cognizable either in law or equity.*

Sec. 1131. EQUITY OR CHANCERY LAW DEFINED.—In its literal acceptance, equity is nearly synonymous with justice, but in its technical sense it means chancery law, or that system of rules by which courts of chancery are governed in the administration of justice. This, like the common law, consists of precedents running through nearly the same lapse of time.**

*Am. & Eng. Encyc. Law (2d ed.), "Equity"; Woodford v. Leavenworth, 14 Ind. 311; Hill v. Barrett, 14 B. Monr. 67; Turner v. Pierce, 34 Wis. 658.

**Walker, Am. Law, 55.

The early writers on equity were inclined to forget the distinction made by Walker, and like Grotius give all the

Sir Henry Maine characterizes equity as a series of "agencies by which law is brought into harmony with society".* While Mr. Lobingier, the author of the article on Equity in the American and English Encyclopedia of Law, speaks of it as a *source* rather than a *subject*—a source which has contributed to our jurisprudence equally with the common law and legislation, and not a subject with rigid boundaries and logical subdivisions.** That the results of the equity or chancery courts in ameliorating the condition of the

credit for administering justice to the equity courts, his definition of equity as given by Blackstone, being "the corrections of that wherein the law (by reason of its universality), is deficient."—1 Bl. Com. 61.

"Equity, then, in its true and genuine meaning, is the soul and spirit of all law; *positive* law is construed, and *rational* law is made by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree".—3 Bl. Com. 429, *et seq.*

"By judicial equity is meant a systematic appeal for relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in measure as well by considerations of public policy as by established precedent, and by positive provisions of law."—Phelps, Jurid. Eq. p. 192.

*Maine's Ancient Law, 23-24.

**Am. & Eng. Encyc. Law (2d ed.), p. 149.

law would have been accomplished by other expedients cannot be doubted, when we see how easily the two systems are united under modern practice and administered by the same judge sitting one moment as a law judge, and the next as an equity court.

Sec. 1132. AUTHORITIES ON EQUITY JURISPRUDENCE OR CHANCERY LAW.—Among the early standard works on Equity, is Judge Story's book on Equity Jurisprudence, which has reached its 13th edition. An excellent work of current authority is Pomeroy's Equity Jurisprudence in three volumes, now in its second edition. Adam's Equity, a book viewing the subject from the standpoint of jurisdiction, has reached its eighth American edition. Bisham's Principles of Equity is a single volume work of great value, which is in its 6th edition. There are numerous other authorities, among which we mention, Beach, Bigelow, Brett, Merwin, Shiras, Smith, Snell, and Williard. Perhaps the most useful authority for a practitioner is the American and English Encyclopedia of Law, which by its cross-references to the special topics in equity jurisprudence, and numerous citations from the various states, becomes more exhaustive than any other work.

CHAPTER II.

PRINCIPLES OF JURISDICTION, MAXIMS AND DOCTRINES
OF EQUITY.

Sec. 1133. EQUITY HAS NO JURISDICTION OVER CRIMES.—It is one of the well settled principles limiting equity jurisdiction, that a court of equity, unless its jurisdiction is enlarged by an express statute, is limited to the protection of civil rights, and has no power either to prevent the commission of crimes, or interfere with their prosecution, pardon or punishment. But where the equity court has jurisdiction because of a wrongful invasion of private property, this jurisdiction will not be divested because the wrongful act also constitutes a crime.*

Sec. 1134. EQUITY WILL NOT ASSUME JURISDICTION WHERE THERE HAS ALWAYS BEEN A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW.—Ever since equity jurisprudence began to be governed by rules and to approach a definite system of procedure it has refused to entertain actions when there was a complete, adequate and practical remedy at law. The principle was early applied by the court in refusing to

*Mayor of York v. Pilkington, 2 Atk. 302 (1742); Littleton v. Fritz, 65 Ia. 488; Mugler v. Kansas, 123 U. S. 623; West v. Mayor, 10 Paige, 539; 75 N. Y. 362; 44 Conn. 419; 70 Miss. 602; 52 Ala. 198; 77 N. C. 2.

entertain actions for the recovery of land, since the remedy by ejectment at law was complete.* Though the court had by mistake assumed jurisdiction in such a case, its adjudication is not void, and will be binding on the parties and cannot be attacked collaterally.**

Sec. 1135. ENLARGEMENT OF LEGAL REMEDY DOES NOT AFFECT JURISDICTION IN EQUITY.—But the fact that after equity has assumed jurisdiction of certain subjects, the legal remedies is enlarged, whether by judicial construction, or legislative action, will not divest the equity courts of their customary jurisdiction, unless this is the express of fair intention of the statute.***

Sec. 1136. EQUITY WILL RETAIN JURISDICTION TO GIVE COMPLETE RELIEF.—Where the equity court has rightfully taken cognizance

**Tenham v. Herbert*, 2 Atk. 483; *Hipp v. Babin*, 19 How. 271; *Lewis v. Cocks*, 23 Wall. 466; 136 U. S. 393.

***Mellen v. Iron Works*, 131 U. S. 352; *Goodman v. Winter*, 64 Ala. 410.

Unless the remedy at law is practical, efficient, and of prompt and accurate administration equity will assume jurisdiction, and where the matter involves long and complicated accounts, equity will take jurisdiction, notwithstanding the remedy at law. *Warner v. McMullin*, 131 Pa. St. 370; 130 U. S. 505; 48 Minn. 372; 58 Conn. 12; 62 Mich. 480.

****Atkinson v. Leonard*, 3 Brown, Ch. 218, 224; *Reeves v. Morgan*, 48 N. J. Eq. 429; *Darst v. Phillips*, 41 Ohio St. 514; *Case v. Fishback*, 10 B. Monr. 40; *Eyre v. Everett*, 2 Russ. 381-2. In the last case Lord Eldon stated: "This court will not suffer itself to be ousted of any part of its original jurisdiction because a court of law happens to fall in love with the same or a similar jurisdiction."

of a particular controversy, it will continue its adjudication for the purpose of giving complete relief, though the matter may involve questions purely legal in nature. As stated by Lord Nottingham, "Where this court can determine the matter, it shall not be handmaid to other courts, nor beget a suit to be ended elsewhere."* This results from the maxim that equity seeks to prevent a multiplicity of suits.** But the suitor must bring himself in the first instance within the equitable jurisdiction of the court, or bring his action in good faith with reason to believe himself entitled to equitable relief, and then the court will grant both equitable and legal relief, or legal relief alone if it is more practicable.***

Sec. 1137. EQUITY WILL TAKE JURISDICTION TO PREVENT A MULTIPLICITY OF SUITS.—In order to prevent a multiplicity of suits, and carry out its scheme of applying practical and speedy justice to controversies, equity courts will assume jurisdiction where numerous persons have a community of interest or a common right or title in the subject-matter as against a common adversary, or where such persons have an equitable cause of action or defense against such adversary, involving the same

**Parker v. Dee*, 2 Ch. Cas. 200; and see, 129 N. Y. 274; 113 N. Y. 213.

***Eastman v. Bank*, 58 N. H. 421; *Turner v. Pierce*, 34 Wis. 658; 133 N. Y. 16.

****Case v. Minot*, 158 Mass. 577; 106 Mass. 232; *Gormley v. Clark*, 134 U. S. 338; *Russell v. Clark*, 7 Cranch, 69; 93 Ala. 542.

questions of law and fact.* So where there is danger of a number of suits at law between the same individuals, and concerning the same subject-matter, or such suits are actually brought, and are not yet adjudicated, or not conclusive, equity will assume jurisdiction to put an end to the litigation. The principle is a corollary to that which gives jurisdiction where there is no plain, adequate and complete relief at law.**

MAXIMS OF EQUITY.

Sec. 1138. THE MAXIMS OF EQUITY.—While at first the decisions in the equity courts were supposed to be in accordance with the conscience of the

*How v. Tenants of Bromsgrove (1681), 1 Vern. 22; Cadigan v. Brown, 120 Mass. 493; Adams v. Manning, 48 Conn. 477. The action, known as a "bill of peace", may be employed where the claim is preferred by one against a number, or by a number against one. The party defending must have some defense to the suits to entitle him to equitable jurisdiction. 29 Fla. 617. "There must be some recognized ground of equitable interference or some community of interest in the subject-matter of controversy, or a common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there is a community of interest merely in the questions of law or fact involved."—By the court in Tribette v. Ill. Cent. R. Co., 70 Miss. 182.

**Marsh v. Reed, 10 Ohio, 347; Warren Mills v. Seed Co., 65 Miss. 391; Lembeck v. Nye, 47 Ohio St. 336; Wheelock v. Noonan, 108 N. Y. 179; 54 N. Y. 159; Eldridge v. Hill, 2 Johns Ch. 281,

Chancellor, and to vary according as the "conscience" of that personage varied, and the court was made the subject of some very caustic remarks by the common law judges in consequence.* This is now remedied, and equity through a long succession of able chancellors, and numerous established precedents, which in accordance with the doctrine of *stare decisis*,—which came to prevail in equity under the chancellorship of Lord Eldon,—now claims to be a science, and like other sciences is governed by fixed maxims and doctrines.**

The twelve or thirteen maxims of equity are concise statements gleaned from the established practice of

*"For *law* we have a measure, and know what to trust to; *equity* is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience."—Seldon, Table Talk, Tit. Equity, cited in 3 Bl. Com. 432n.

**"The doctrines of this court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot."—Per Lord Eldon in *Gee v. Pritchard*, 2 Swanst. 414. See also, Kerly's Hist. of Equity; 3 Bl. Com. 429, *et seq*; Hargrave's Law Tracts, 325; 1 Story Eq. Jur. 319.

the equity courts, indicating generally as well what equity is, as what it is not, and now are usually applied as determining the limits of equity jurisprudence. They are stated as follows:—1. He who seeks equity must do equity. 2. He who comes into equity must come with clean hands. 3. Equity aids the vigilant, not the slothful. (These three are sometimes classified as pre-requisite maxims.) 4. Equity acts specifically, and not by way of compensation. 5. Equity acts in personam. 6. Equity follows the law. (The last three are classified as descriptive maxims.) 7. Equity suffers no wrong without a remedy. 8. Equity regards that as done which ought to have been done. 9. Equity regards the substance and intent, not the form. 10. Equity imputes an intent to fulfil an obligation. 11. Equality is equity. 12. Where the equities are equal the law will prevail. 13. Where the equities are equal priority of time will prevail. (The maxims from the 7th to the 13th are classified as substantive maxims.)*

Sec. 1139. PRE-REQUISITE MAXIMS.—These show what the applicant for equity must possess before he can invoke the aid of a court of equity, and are three in number.

*Am. & Eng. Encyc. Law (2d ed.) Equity; 1 Pom. Eq. Jur. Sec. 360. Bispham's Prin. of Eq. omits the maxim, "Equity regards the substance and intent, and not the form," thus enumerating but twelve maxims, and other authorities give them a different classification and vary the language somewhat. See Fetter's Hand Book of Eq. Chap. 3; Hayne's Outlines of Eq., p. 19; Phelps, Jurid. Eq., p. 296.

1. He Who Seeks Equity Must Do Equity. This is one of the earliest maxims of equity to receive general sanction. It arose from the desire of the court to finally dispose of all matters arising and growing out of a controversy over which it had jurisdiction. It therefore required the complainant, as well as the defendant, to perform all acts on his part which are necessary to the final disposition of the case. Thus if the vendor or the vendee comes into court to enforce specific performance of a contract in regard to the sale of land, the court having ascertained and determined that the contract ought to be enforced, will decree that the vendor shall execute to the purchaser the proper deed of conveyance, and that the purchaser shall pay to the vendor the balance due. This will be the decree no matter which party is complainant.* In this class of cases the complainant is not required to do any act which he would not be compelled to do if he had been made defendant. But there is another class of cases where, under this maxim, the complainant is required to do what he could not be compelled or required to do if he were defendant, and the defendant complainant. For example, if to secure a loan the complainant has executed a bond bearing usurious interest, and the statute makes such bond void, the court will not entertain his bill to annul the bond except upon the condition that he pay the defendant the amount of the loan.**

*Willard v. Tayloe, 8 Wall. 557; Eastman v. Plumer, 46 N. H. 480; Bodwell v. Bodwell, 66 Vt. 101.

**Campbell v. Murray, 62 Ga. 86; Eslava v. Crampton, 61

2. He Who Comes Into Equity Must Come With Clean Hands. This is not a maxim peculiar to equity alone, since law courts also refuse to aid a wrongdoer, and enforce for his benefit an illegal or immoral contract. But the rule is broader and more far reaching in equity than at law; and again there are certain exceptions to the rule as applied in equity, and generally, the rule is limited to bar only cases in which the iniquity of the complainant is directly connected with the matter in litigation.*

Ala. 507; Corby v. Bean, 44 Mo. 379; Mason v. Gardiner, 4 Bro. C. C. 436; 42 Ill. 256.

So where the complainant seeks to be relieved from illegal taxes, a part of which are lawful, he must, as a condition of being relieved from payment of the illegal taxes, pay the others. *Smith v. Auditor*, 20 Mich. 398; *Merrill v. Humphrey*, 24 Mich. 170; *Montgomery County v. Elston*, 32 Ind. 27; *Reed v. Taylor*, 56 Ill. 288; *Casey v. Wright*, 14 Mont. 315; 45 Neb. 96; 92 U. S. 101; 99 Ind. 352. The complainant must do equity as a condition precedent. *Comstock v. Johnston*, 46 N. Y. 615; *Pattee's Cas.* 5.

Again, where a party seeks the benefit of a purchase made for him in the name of a trustee, to whom he is indebted, he will not be relieved except upon payment not only of the purchase money but of the other indebtedness. *Sturgis v. Champneys*, 5 My. & Cr. 97; *Campbell v. Campbell*, 21 Mich. 438; *Foster v. Wryhtman*, 123 Mass. 100; *Tongue v. Nutwell*, 31 Md. 302. The maxim is also applied in cases of rescission of contracts, partition, quieting title, and the like, where it is equitable that the complainant perform some act on his part. But the maxim is only applied to enforce the doing of something arising from or belonging to the transaction in controversy. *Otis v. Gregory*, 111 Ind. 504; *Finch v. Finch*, 10 Ohio St. 507.

**Dering v. Winchelsea*, 1 Cox, 318; *Hay's Estate*, 159 Pa. St. 384; *Foster v. Winchester*, 92 Ala. 497. If the complain-

The original and primary jurisdiction of the court of chancery was based upon the fact that the complainant could not obtain a recognition of his just rights in a court of law. The very foundation of his claim to be heard, therefore, was grounded upon the theory that in equity and good conscience he was entitled to relief. It follows, that if he is a wrongdoer, he is on that account without standing in the court, and cannot be heard to complain of another wrongdoer in the same transaction.*

The maxim requires the court to refuse relief to a party not only under an illegal contract, but also under one that is unconscionable, owing to the sharp practices of the complainant.** So in all cases where the complainant's claim is tainted with his own fraud, relief will be denied. As where he seeks to recover property which he has conveyed in fraud of creditors, equity will not aid him.***

ant's conduct has been exemplary as regards the subject-matter of the suit, his misconduct in other and independent matters will not be considered. Neither will the complainant's fraud be regarded if it has not injured the defendant. *Meyer v. Yesser*, 32 Ind. 294.

**Overton v. Bannister*, 3 Hare, 503; *Lewis' Appeal*, 67 Pa. St. 153; *Atwood v. Fisk*, 101 Mass. 363; *Bleakley's Appeal*, 66 Pa. St. 187.

***Willard v. Tayloe*, 8 Wall. 557; *Pomeroy's Eq. Jur. Sec. 400n*.

****Bolt v. Rodgers*, 3 Paige, 154; *Stewart v. Inglehart*, 7 G. & J. 132. But a party is sometimes relieved against an illegal contract, when he acted in good faith and was not aware at the time that the contract was in violation of the statute or against public policy. *Reynell v. Spynne*, 8 Hare,

3. Equity Aids the Vigilant, Not the Slothful. This maxim is sometimes stated as "Delay defeats equities," and is a corollary to the first one requiring the complainant to do equity. One must not slumber upon his rights, when by thus doing he permits others to acquire interests, or expend money in ignorance of them. Thus if one, having full knowledge that what another is about to do will seriously interfere with his rights, it will be too late for him to apply to the court for relief after such acts have been performed, he must ask the aid of the court immediately to enjoin the doing of the acts. After the injury is done he will be left to his remedy at law for damages. It is said that nothing will call forth the action of equity except conscience, good faith and diligence. And the authorities indicate that diligence is not the least im-

222. But if he knew that the contract was unlawful he will not be permitted to enforce it. *Sykes v. Beadon*, 11 L. R. Ch. D. 170.

The right of a plaintiff to recover is sometimes questioned when the given contract was made on the part of the defendant to enable him to violate some statute? The rule in such case is said to be this: If the plaintiff has done anything to aid or assist the defendant to accomplish his illegal purpose, aside from the sale, or payment, or any other part of the contract is in any way dependent upon the execution of the illegal purpose, the complainant cannot enforce the contract. If, however, although the complainant knows for what illegal purpose the contract is made by defendant, he takes no part whatever in such illegal project, and the contract does not depend in any part on such illegal project, then he may recover. *Tracy v. Talmadge*, 14 N. Y. 162; 77 Hun, 215; 144 Pa. St. 235.

portant of these requisites.* This rule is the statute of limitations in equity.

Sec. 1140. DESCRIPTIVE MAXIMS.—By descriptive maxims is meant those which describe the manner in which equity gives relief. They are:—

1. Equity Acts Specifically and Not by Way of Compensation. By this maxim is meant that equity instead of giving a money damage in lieu of the performance of an act, compels the defendant to specifically perform the required act, by three remedies known as “specific performance”, “injunction”, and “reformation”.

2. Equity Acts in Personam and Not in Rem. This maxim refers to the manner in which chancery enforces its decrees, making their performance obligatory on the person, rather than by looking to the property of the defendant for satisfaction. By the application of this maxim the equity courts from the earliest times have been able to enforce decrees regarding land lying outside the jurisdiction of the court, as in another country, or in another state.**

3. Equity Follows the Law. This maxim is quite restricted, and simply means that equity follows the law, when the rule of the statute or common law is

*Smith v. Clay, 3 Bro. C. C. 639; Ellison v. Moffat, 1 Johns. Ch. 46; Pattee's Cas. 4; Calhoun v. Millard, 121 N. Y. 81; 49 N. J. Eq. 397; Akins v. Hill, 7 Ga. 573.

**Penn v. Lord Baltimore, 1 Ves. Sr. 444; Muller v. Dows, 94 U. S. 444; Pattee's Cas. 19; Brown v. Desmond, 100 Mass. 267; Olney v. Eaton, 66 Mo. 563; Palmer v. Mead, 7 Conn. 149; 16 S. C. 276.

direct and positive. Thus equity will never direct a party to violate the law, nor dispense with the obligations of the statute, and hence will not modify or change the rule in regard to the descent of property.* So where the rules of law are applicable equity will follow them, and in equity matters adopt rules analogous to those of the law in similar matters. But this is not always so, and frequently gives relief where the law could not do so.**

Sec. 1141. SUBSTANTIVE MAXIMS.—The substantive maxims declare the fundamental doctrines applied by equity in administering relief, and are:—

1. Equity Suffers No Wrong Without a Remedy. This maxim is said to be the very foundation of equity jurisdiction. Under the common law there were many wrongs which the law courts could not remedy at all or only partially redress. It was to meet this defect of the common law that equity began to assume separate jurisdiction, and the application of this maxim is co-extensive with the jurisdiction of the chancery courts. The limitations and restrictions on the maxim are these: That only legal rights as distinguished from moral rights and obligations are enforced in equity; and where a party has a complete and adequate remedy at law, but the law court is unable to enforce its command through neglect or ina-

*Comper v. Comper, 2 P. Wms. 720.

**Burgess v. Wheate, 1 W. Black, 123; Rookes Case, 5 Rep. 99b; Kemp v. Prior, 7 Ves. 237; Hedges v. Dixon Co., 150 U. S. 192; Calef v. Parsons, 48 Ill. App. 258; 165 Ill. 305; Clark v. Potter, 32 Ohio St. 49.

bility, the complainant has a mere moral right to redress in equity, and the court will not interfere. If there is no relief at law, due to the nature of the claim, equity will interfere; while if there is no actual relief at law, because in that particular case, although ample ground for relief existed in the court, it bore no fruit in fact, equity will not interfere.* The maxim is invoked when the court deals with newly created rights and duties.

2. Equity Regards That As Done Which Ought to Have Been Done. This maxim is the foundation upon which rests the doctrine of equitable estates. Every kind of equitable property, with a few exceptions, as distinguished from legal ownership, is due to this maxim. In one aspect the meaning of the maxim is declared to be that "the party to a contract, or his legal representatives, may insist upon being placed in a situation equally as advantageous as if the contract had been fulfilled,"—or more broadly speaking, it means that "whenever the holder of property is subject to an equity in respect of it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out, and as impressed with the character which it would then have borne". Thus, in case of an executory sale, where the whole of the price has not been paid, equity

*Finnegan v. Ferrandina, 15 Fla. 379; Rees v. City, 19 Wall. 107; Heine v. Leon Coms. 19 Wal. 655-8; Joy v. St. Louis, 138 U. S. 1; R. R. Co. v. Rutherford, 62 Fed. Rep. 796; Weber v. Weber, 90 Wis. 467; Greene v. Keene, 14 R. I. 388.

treats such balance as personal assets of the vendor for which he would have a lien upon the land.* But the maxim is not only applicable to executory contracts, but applies to all classes of equities, so as to consider as done any act which ought to have been done to secure the rights of another person.** The maxim does not cover what *might* have been done, but only what *ought* to be done, and then only as to those who have stipulated as to what shall be done, or those who stand in their places*** Again, the maxim is not enforced when innocent third persons would be injured, but gives place to the maxim that when equities are equal the law must prevail****

3. Equity Regards the Substance and Intent, Not the Form. The law courts were bound by rigid rules and forms. Thus an instrument under seal, was, at common law, conclusively presumed to have been

*Craig v. Leslie, 3 Wheat. 563, 576; Gardiner v. Gerrish, 23 Me. 46; Williamson v. Krohn, 66 Fed. Rep. 655; Daggett v. Rankin, 31 Cal. 327.

**Frederick v. Frederick, 1 P. Wms. 710; Coventry v. Barclay; 3 DeG. & S. 320; Taylor v. Russell, 119 N. C. 30. One of the oldest and most common application of the maxim is the doctrine of equitable conversion, by which where a will deed or contract directs land to be converted into money, or money expended for land, the courts, in pursuance of the maxim, will treat the property as having that character which by the terms of the instrument it was directed to have. Craig v. Leslie, *supra*; Jackson v. Snell, 34 Ind. 241; Brewer v. Herbert, 30 Md. 301.

***Burgess v. Wheate, 1 W. Black. 123; Crabtree v. Bramble, 3 Atk. 680; Felch v. Hooper, 119 Mass. 52, 57.

****Casey v. Casvaroe, 96 U. S. 467.

made for a consideration, and a total lack of consideration could not be shown; mortgages were considered as conditional sales, and penalties and forfeitures were enforced for the full amount. While equity goes back of the mere formal acts of the parties to ascertain with what intent the act was performed, and then, if possible, aids the parties in doing what they intended to do. Hence it will permit parties to show that a contract under seal was in fact made without consideration, or that it has since been discharged, although such discharge is not evidenced by a contract under seal.* And resulting from this maxim are the equitable doctrines authorizing the chancery courts to relieve from forfeitures, penalties, and the like.**

4. Equity Imputes an Intent to Fulfill an Obligation. This maxim gives rise to the doctrine of resulting trusts. So that when a party is under obligation, by covenant, to do certain acts for the benefit of the covenantee, and does acts which he might have done in pursuance of the covenant, without an indication of his purpose or intent in so doing, equity will presume that the acts were done with intent to fulfil his obligations.*** And when a trustee invests trust funds, and takes the title in his own name, the court will in-

**Stinchfield v. Millikin*, 71 Me. 567; *Meier v. Bank*, 55 Ohio St. 460; *Campbell v. Freeman*, 99 Cal. 546; *Varner v. Rice*, 44 Ark. 251.

***Peachy v. Duke of Somerset*, 2 White and T. L. C. 1100; 10 Wall. 68; 50 N. J. Eq. 73.

****Deacon v. Smith*, 3 Atk. 323; *Wilcocks v. Wilcocks*, 2 Vern 558; *Sowdon v. Sowdon*. 1 Bro. C. C. 582.

fer that the purchase was made for the benefit of the *cestuy que trust*, if the trust funds were actually employed in the transaction.*

5. Equality Is Equity. This maxim is of ancient origin and application, and was designed to mitigate the evils of the common law in allowing certain creditors to secure preference in the distribution of an insolvent estate. Equity seeks to distribute the entire assets pro rata among the creditors, rather than allow each one to take in the order of obtaining judgment against the insolvent.** So at common law when land was conveyed to several persons they were considered joint tenants, while in equity, if there is any circumstance which will justify it, they will be regarded as tenants in common.*** The same is true where several persons own a mortgage taken to secure a loan.**** And the maxim operates to abate legacies pro rata when there is a deficit in the assets; to make an apportionment among creditors holding liens, and among co-contractors and co-sureties.*****

*Ferris v. Von Vechten, 73 N. Y. 113; Johnson v. Dougherty, 18 N. J. Eq. 406.

**Butler Paper Co. v. Robbins, 151 Ill. 632; Bank v. Sherman, 101 U. S. 403; 139 Ill. 549.

***Rigdon v. Vallier, 3 Atk. 731; Harris v. Ferguson, 16 Sim. 308; Aveling v. Knipe, 19 Ves. 441; Luke v. Gibson 1 White & T. L. Cas. 215.

****Randall v. Phillips, 3 Mason, 378; Goodwin v. Richardson, 11 Mass. 469; Kinsley v. Abbott, 19 Me. 430.

*****Russell v. Failor, 1 Ohio St. 327; Hawker v. Moore, 40 W. Va. 49; Faurot v. Gates, 86 Wis. 569.

6. Where the Equities Are Equal the Law Will Prevail. This maxim is closely allied to the one preceding and the one following it. Under this maxim, where the equities are equal, he who has in addition to his equal equitable claim, a legal claim also will prevail.* This maxim, along with the next one, forms the foundation for the doctrine concerning priorities, notice and *bona fide* purchasers without notice, to which reference will again be made. (See Sec. 1147 *et seq.*)

7. Where the Equities Are Equal He Who Is First in Time Will Prevail. This maxim is a corollary of the preceding, expressing a different phase of determining priorities where otherwise the equities are equal. The equities must be equal, then if one is prior in time, he shall prevail.** It is usually applied as between lienholders.

DOCTRINES OF EQUITY.—ESTOPPEL, ELECTION, SATISFACTION, PERFORMANCE, CONVERSION, ETC.

Sec. 1142. EQUITABLE ESTOPPEL.—In equity, if one by his words or conduct, causes another to rely upon the existence of a certain state of things, and induces that other to act on that belief, and thereby to change his former position for the worse, the person

*Thorndike v. Hunt, 3 DeG. & J. 563; Fitzsimmons v. Ogden, 7 Cranch, 2; Phillips v. Crommond, 2 Wash. C. C. 441; Shiras v. Craig, 7 Cranch, 34; Williams v. Charlier, 15 N. Y. App. Div. 128.

**Rice v. Rice, 2 Drwe. 73; Spencer v. Clark, L. R. 9 Ch. Div. 137; Berry v. Mutual Ins. Co., 2 Johns Ch. 603.

so inducing the other is *estopped*, or precluded from averring against the other a different state of things as existing at the same time.* The elements necessary to create equitable estoppel include the following:—

1. Misrepresentation or concealment as to material facts by words or conduct of the culpable party.

2. Actual or imputed knowledge as to the untruthfulness of the facts alleged by the culpable party.

3. Innocent ignorance of the true state of affairs on the part of the party misled.

4. It is enough if the culpable party intend, or ought reasonably to anticipate that his representations will be acted upon by the other party, or by the public generally.**

5. The party asserting an estoppel must have acted promptly and to his prejudice on the assertions or conduct of the culpable party.***

The effect of equitable estoppel is to give the party entitled to its benefits the same rights against the party estopped as though the representations had been true; in other words, the culpable party has to stand by and make good the facts he has asserted.***

*Keate v. Phillips, 18 Ch. Div. 560; Dickerson v. Colegrove, 100 U. S. 578; Horn v. Cole, 51 N. H. 287; Pickard v. Sears, 6 Ad. & El. 469; Gillett v. Wiley, 126 Ill. 310.

**Vreeland v. Ellsworth, 71 Ia. 347; Jackson v. Allen, 120 Mass. 79; 2 Pom. Eq. Jur. Sec. 809-810; Blair v. Wait, 69 N. Y. 113; McLean v. Dow, 42 Wis. 610; 55 N. Y. 41; Combes v. Chandler, 33 Ohio St. 178.

***Andrews v. Aetna Ins. Co., 85 N. Y. 334; Weinstein v. Bank, 69 Tex. 38.

****Grissler v. Powers, 81 N. Y. 57; 97 Mass. 498.

Sec. 1143. ELECTION. Resulting from the maxim that he who seeks equity must do equity, is the doctrine of *election*, by which when the donor of property in the same instrument undertakes to transfer the donee's property or interest to a third person, the donee must elect to take either; under the instrument, and transfer his property to the party named; or, against the instrument, forfeiting so much of the gift as is necessary to indemnify the third person by reason of the donee's failure to carry out all the provisions of the instrument.*

Election becomes necessary in all cases where the deed or instrument granting property shows a clear intention on the part of the grantor to therein dispose of property belonging to the person required to elect, and property absolutely owned by the grantor is given to the person who is required to elect.**

The election may be either express or implied. An

*Huhlien v. Huhlien, 8 S. W. Rep. 260; Peters v. Bain, 133 U. S. 670; Brown v. Ward, 103 N. C. 173; Brown v. Brown, 42 Minn. 270.

**Hattersley v. Bissett, 25 Atl. Rep. 332; Thompson v. Thompson, 2 Strobh. 48; Penn. v. Guggenheimer, 76 Va. 839; Sherman v. Lewis, 44 Minn. 107; Bennett v. Harper, 36 W. Va. 546; Snell's Eq., p. 240.

In the absence of express statute, a widow is not compelled to elect between her dower and a testamentary bequest from her husband, unless the will declares the same to be in lieu of dower, either expressly or by implication; a mere doubtful expression not requiring election, and she takes both. Adsit v. Adsit, 2 Johns. Ch. 448. But statutes now usually require an election in any case. 1 Pom. Eq. Jur., Sec. 494.

election will be implied if the party by his acts, conduct or dealing with the property indicates his intention to treat it as his own, after a knowledge of his right to elect.*

Persons required to elect may first ascertain by action or otherwise the respective values of their own property, and of that given them in the instrument requiring the election.** Married women may elect without the intervention of a court, or they may have an inquiry as to the most beneficial course to pursue before election.*** In the case of infants, the election may be postponed until their majority, but usually the court elects for them according to their best interests, as is also the case where the election is to be made by a person *non compos mentis*.****

An election once made, and not in mistake of facts, is irrevocable, and binding on the elector, and all claiming under him, as well as the other beneficiaries in the instrument.*****

Sec. 1144. SATISFACTION.—By *satisfaction* in equity is meant the donation of a thing with the in-

*Penn v. Guggenheimer, *supra*; Watson v. Watson, 128 Mass. 152; Tibbitts v. Tibbitts, 19 Ves. 663.

**Pusey v. Desbouvrie, 3 P. Wms. 315; 3 Brown Ch. 88.

***Davis v. Page, 9 Ves. 350; Howell v. Tomkins, 42 N. J. Eq. 305.

****Streatfield v. Streatfield, 1 White & T. L. Cas. 333; 3 Brown Ch. 285; Kennedy v. Johnston, 65 Pa. St. 451. 61 N. H. 596; 32 Minn. 336.

*****Wake v. Wake, 3 Br. Ch. 255; Coru v. Cory, 37 N. J. Eq. 198; 1 Pom. Eq. Jur. Sec. 516.

tention that it shall be taken either wholly or in part extinguishment of some claim of the donee against the donor. The intention may be implied as well as express, but there must be something to show that the donor's intent was to make a gift in satisfaction of the claim.*

If the gift is by parol and not accompanied by any writing explaining it, oral evidence is admissible to show its true purpose, and this will include the donor's declarations made at the time.** If the gift is evidenced by a written instrument from which there is a presumption that it was made in satisfaction of a prior claim, parol evidence may be admitted to rebut this presumption, but if there is no presumption from the instrument parol evidence is not admissible to show the intent of the parties.*** This doctrine is applied in equity where a debtor, by will or otherwise, confers a pecuniary benefit on his creditor, and where a parent or one *in loco parentis* makes a double provision for a child or person standing towards him in a filial relation.****

*Hardingham v. Thomas, 2 Drew, 353; 1 Pom. Eq. Jur. Sec. 520.

**3 Hare, 509; Sims v. Sims, 10 N. J. Eq. 158; 5 Rand (Va.), 577.

***Gilliam v. Chancellor, 43 Miss. 437; 82 N. Y. 103; Hall v. Hill, 1 Dru. & War. 94.

****Talbot v. Shrewsbury, 2 White & T. L. Cas. 379; Strong v. Williams, 12 Mass. 390.

Where a testator gives a legacy to a creditor equal to or exceeding the amount of the debt, the presumption arises that it was intended as a discharge of the debt, but the pre-

Sec. 1145. PERFORMANCE.—It is a doctrine of equity resting on the maxim which imputes an intention to fulfil an obligation that, a covenant to do an act by which a benefit or specified property will be conferred on another is deemed performed both where the party does some act which practically effects the purpose of the covenant, though not expressly referring or conforming to the covenant, and where by operation of law the party allows property to descend to the covenantee and which practically fulfills the obligation.*

Sec. 1146. EQUITABLE CONVERSION.—This subject has already been considered under the maxim that equity regards that as done which ought to be done, and from which it springs. Conversion is said to be that notional change in the nature of property by which, for certain purposes, realty is considered

sumption will be overcome by slight circumstances to the contrary. So if a father or person standing *in loco parentis* makes a testamentary provision for a child, and then, before death makes a gift or advancement to such child, a presumption arises that such gift was in satisfaction of the testamentary bequest, and such satisfaction is called "ademption." *Jones v. Mason*, 5 Rand, 577, and it takes more than slight circumstances to overcome the presumption in favor of ademption, 18 Ves. 140. So where a father, or person standing in that relation, agrees to make a provision for a child, and afterwards makes a testamentary bequest to such child, the presumption arises, that such provision is to be in satisfaction of the agreement. 3 Ves. 516; 2 H. L. Cas. 131.

**Goldsmid v. Goldsmid*, 1 Swanst. 211; 2 Vern 558.

personalty, and personal property as realty, and transmissible and descendible as such.*

Aside from particular terms governing, the rule is, that conversion takes place at the time the instrument becomes operative, that is, in wills at the death of testator, and in deeds and other instruments, on execution and delivery.** For the purposes of the instrument directing it, the conversion operates to change the nature of the property as directed, including all the direct consequences resulting from the notional change.***

Sec. 1147. NOTICE.—Where the equities are equal in the litigants it becomes important to inquire as to other matters which may assist the court in determining which should prevail. In so doing it may

*3 Pom. Eq. Jur. Sec. 1159.

**Snell's Eq. p 211; 160 Pa. St. 65; *Allen v. Watts*, 98 Ala. 384.

****Steed v. Preece*, L. R. 18 Ex. 192; *In re Simmons*, 55 Ark. 485; for purposes not indicated in the instrument it will be treated as it actually is; thus, land which is considered converted into personalty cannot be sold by the executor as though actually personal property. 95 N. Y. 7; 72 Wis. 539. *Contra* 123 Pa. St. 1.

Double Conversion takes place where land is directed to be sold and the proceeds reinvested in other lands, or vice versa; and the court treats it as having gone through the steps directed, however numerous they may be. *Pearson v. Lane*, 17 Ves. 101; *Ford v. Ford*, 80 Mich. 42; 82 Ga. 687. While Reconversion is the changing back to its original state land or personalty equitable converted as before indicated. It occurs where the party getting the property has the right to elect in what form he will accept it. *Seeley v. Jago*, 1 P. Wms. 389; 69 N. Y. 1; 82 Ga. 687.

be of importance to ascertain whether or not one of the claimants took with *notice* of a prior equitable right in another, and in such case this fact is sufficient to defeat the after acquired right. Notice is not the same as knowledge, and may be actual notice, or constructive notice.*

Actual notice may be either knowledge of a fact, or conscious possession of the means of knowledge, though not used.** While constructive notice is the legal presumption of notice or knowledge arising either from strong evidence, or existing by reason of express statutes defining in advance what shall constitute notice, as the recording acts.***

Thus visible and notorious possession of land is notice of the possessor's title to subsequent purchasers and incumbrancers, if not merely temporary or special in its nature.**** And one is charged with notice of all matters appearing on the face of any instrument through which he derives title, or which might be ac-

*"By notice is meant the information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge."—2 Pom. Eq. Jur. 594.

**Drey v. Doyle, 99 Mo. 459; Brinkman v. Jones, 44 Wis. 498; 79 Me. 195.

***Story's Eq. 399; Coal Co. v. Doran, 142 U. S. 417.

****Phelan v. Brady, 119 N. Y. 587; 64 N. Y. 76; 109 U. S. 504; 23 Or. 455.

quired from inquiry suggested by such recitals.* State statutes universally require instruments affecting title to land to be recorded, and make such recording constructive notice or public notice of their contents.**

Sec. 1148. BONA FIDE PURCHASERS.—By a *bona fide* purchaser is meant one who for a valuable consideration and in good faith acquires property, without notice at the time the consideration is paid, of the adverse rights of others therein.*** Such a purchaser of property will be protected in equity, though he buys from one who had notice of adverse rights; and the purchaser from a *bona fide* purchaser will be protected though the former had notice of adverse

*Wilson v. Hart, 1 Ch. App. 463; White v. Foster, 102 Mass. 375; 142 U. S. 417.

**2 Pom. Eq. Jur. 649; Bird v. Dennison, 7 Cal. 297.

Lis Pendens. In the absence of statutes, one who pending a suit to reach specific property, within the jurisdiction of the court, except negotiable paper, acquires from a party thereto any interest therein or lien against the same, is bound by the judgment or decree that may be rendered, and this is so though he purchases for a valuable consideration and without actual notice of the pending suit, since the suit is presumed to be constructive notice to all. 1 Johns. Ch. 566; Story's Eq. 405; 2 P. Wms. 482; 43 Ia. 430; 17 N. Y. 125. Perhaps the doctrine does not apply to an action for divorce. Scott v. Rodgers, 77 Ia. 483, unless the particular property to be charged with alimony is described in the complaint. 43 Kan. 590; 20 Nev. 232.

***1 Story Eq. Sec. 409; 85 Ill. 597; 104 N. C. 515; 2 Pom. Eq. Jur. Secs. 737-746.

rights, otherwise the title of the *bona fide* purchaser would be worthless.*

Sec. 1149. PENALTIES AND FORFEITURES.
—As a doctrine of equity resulting from the maxim that equity looks to the intent rather than the form, equity will refuse to lend its assistance to enforce a forfeiture or penalty in its strict terms, but will look to the substantial and fair intent of the instrument and decree substantial damages for the failure to perform the act working the forfeiture or penalty.** But this doctrine of equity does not extend to relieve the party from statutory penalties, or liquidated damages payable on the happening of a single event, and where there is no other adequate method of fixing the damage resulting from the breach of contract.***

*Scotland Co. v. Hill, 132 U. S. 107; Church v. Rutland, 64 Pa. St. 432; 87 Mo. 478; 16 Mass. 406. The bona fide purchaser could not pass a good title back to his grantor who had notice. Clark v. McNeal, 114 N. Y. 295.

**Sloman v. Walter, 2 White & T. L. Cas. 2022; Little v. Banks, 85 N. Y. 258; Dwinel v. Brown, 54 Me. 468; Myer v. Hart, 40 Mich. 517.

***11 Ap. Cas. 332; State v. Hall, 70 Miss. 678; 94 N. C. 675; 76 Ala. 51; 127 Ill. 101; 52 Wis. 669; 57 Pa. St. 65.

CHAPTER III.

GROUNDS FOR EQUITABLE RELIEF.

Sec. 1150. ACCIDENT.—One of the oldest grounds for equity relief is that of *accident*, by which is meant the happening of some unusual event, not intended or provided for, whereby one person, without gross negligence on his part, has been deprived of some right, or another person has obtained an advantage.* In case of many accidents the law gives complete relief, and equity has no jurisdiction, while in other cases the remedy at law is inadequate or none is given and equity gives relief.**

Sec. 1151. SAME SUBJECT—WHEN RELIEF WILL BE GRANTED.—Two considerations must concur to give equity jurisdiction in case of accident. First, the party seeking relief must show a conscientious title thereto; and second, the law courts must have been originally unable to grant suitable relief.*** A party may be injured by an accident, if he resorts to a law court, in that: 1. He may have a legal right and lose his remedy at law. 2. He may by accident,

*Smith Eq. Jur. p. 36; 2 Pom. Eq. Jur. Sec. 823.

**People v. Bartlett, 3 Hill, 571; People v. Manning, 8 Cow. 297.

***Ex parte Greenway, 6 Ves. 812; Fowler v. Bott, 6 Mass. 63; L. R. 9 Q. B. 462; 42 N. H. 109; 99 Mo. 622.

according to rules of law, be deprived of the right itself. 3. He may incur through the accident under the rules of law, some liability which it is inequitable for him to bear.

1. Legal Right and No Remedy at Law. Under this head may be classed accidents depriving a man of the proof of his rights, as lost bonds, promissory notes, deeds, mortgages, etc. The common law has been enlarged by statute in these cases, but equity maintains its jurisdiction to give relief.*

2. Deprived of the Right Itself. An example of this is where an apprentice has paid a fee for instruction and the master dies during the period; equity will decree the repayment of a reasonable portion of the fee. (*Newton v. Rowse*, 1 Vern. 460.)

3. Inequitable Liability Incurred. As where an administrator has paid claims in full, the estate being solvent, and then by accident the assets are destroyed, equity will grant relief. (2 Freem. 1.)

Not every accident, however, will be relieved against in a court of equity. Accidents covered by the covenants of a contract will not be relieved against; thus, if a lessee has covenanted to keep buildings in repair and surrender them in the same condition as received, and they are accidentally destroyed by fire, he must rebuild, since that is in reality his contract; so if he has covenanted to pay rent for a

**East India Co. v. Boddaur*, 9 Ves. 464; *Patton v. Campbell*, 70 Ill. 72; *Adams v. Edmunds*, 55 Vt. 352; 107 Mass. 543; 34 Conn. 546; 42 N. H. 109; 16 Ala. 130.

certain term, he must pay notwithstanding the premises have been made untenable by casualty.*

When from accident there has been a non-execution of a mere power, equity cannot grant relief.** But when there has been a defective execution, equity will grant relief in favor of certain persons who are favored in the law, these are: purchaser or mortgagee, creditors, a wife, a legitimate child, a charity;*** and will refuse aid when there is a defective execution as to, the donee of the power, a husband, a natural child, a grand-child, or a volunteer.**** To enable the court to grant relief in such cases the defect must not be one that goes to the very essence of the power, such defects as a want of a seal, witnesses or a signature will be aided.*****

Prof. Bigelow enumerates the following modern instances in which equity grants relief in case of accident: 1. Death of sheriff before making conveyance and after making sale. 2. Destruction of the records in a cause. 3. Loss of deed or mortgage. 4. Loss of

*Tompkins v. Dudley, 25 N. Y. 272; Wells v. Calnon, 107 Mass. 514; 39 Ia. 11; Bacon v. Cobb, 45 Ill. 53; 25 Conn. 530.

**Arundell v. Philpot, 2 Vern 69; Bull v. Hardy, 1 Ves. 270.

***Reid v. Shergold, 10 Ves. 370; Wilkes v. Holmes, 9 Mod. 485; Clifford v. Burlington, 2 Vern. 379; Bruce v. Bruce, L. R. 11 Eq. 371; Imus v. Sager, 7 Hare, 377.

****Ellison v. Ellison, 6 Ves. 656; Watt v. Watt, 3 Ves. 244; Tudor v. Anson, 2 Ves. Sr. 582; Watts v. Bullas, 1 P. Wms. 60; Smith v. Ashton, 1 Freem. 309.

*****Reid v. Shergold, 10 Ves. 370; Adney v. Field, Amb. 654.

sealed instrument. 5. Loss of negotiable paper. 6. Loss of receipt.*

Sec. 1152. MISTAKE AS A GROUND FOR EQUITABLE RELIEF.—Mistake may be either of fact or law.

Mistake of fact, in a legal sense, is defined to be a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, consisting in;—1. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed.**

Mistake of law constitutes a mistake only when it arises from,—

1. A misapprehension of the law by all parties, all supposing that they had understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify.***

*Bigelow's notes to Story Eq. (13th ed), Sec. 78; citing, *Stewart v. Stokes*, 33 Ala. 494; 45 Ala. 205; 10 Heisk. 693; 42 N. H. 109; 70 Ill. 72; 20 Vt. 407; 11 W. Va. 386; 107 Mass. 543.

**Cal. Code, Sec. 1577; Story's Eq. Jur. Sec. 110; Hayne's Eq. p. 80.

***Cal. Code, Sec. 1577; Snell's Eq. p. 525; Willan v. Willan, 16 Ves. 72; 81 Wis. 67; 11 Ohio, 480; 95 Pa. St. 279; 8 Wheat. 174. Ignorance of the law, as a rule, does not excuse, and this was the earlier holdings in all cases, but

Sec. 1153. SAME SUBJECT—MISTAKE OF LAW.—The court will never make for the parties a contract which they did not intend to make, but one which they would have made, perhaps, had they not been ignorant of the law. But if the parties intended to make a certain contract, and through their mutual ignorance of the law, executed a paper containing a different contract, equity will give relief.*

In some cases when a person is in full possession of all the facts, but through ignorance of the law is mistaken as to his legal rights, duties or obligations, and consequently makes a contract affecting injuriously such rights, duties or obligations, courts of equity regard the mistake as one of fact, rather than of law and will grant relief.**

now if the mistake is as to the law governing the conduct of the citizen, a violation of which is a crime, the rule applies, while if it refers to the laws fixing property rights of the individual, there are several exceptions, which may be based on good faith or failure of the parties to assent. *Jacobs v. Morange*, 47 N. Y. 57; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Tompkins v. Hollister*, 60 Mich. 470; 25 Ala. 694; 19 Tex. 303; *Wheaton v. Wheaton*, 9 Conn. 96; 36 N. Y. 673; 18 N. J. Eq. 124; 18 Mich. 354.

**Gillespie v. Moon*, 2 John Ch. 585; *Stone v. Hale*, 17 Ala. 557; *McNoughton v. Partridge*, 11 Ohio 223; *Lont's Appeal*, 95 Pa. St. 279; *Benson v. Markoe*, 37 Minn. 30.

***Macknet v. Macknet*, 29 N. J. Eq. 54; *Pusey v. Desbourie*, 3 P. Wms. 315; *Blakeman v. Blakeman*, 39 Conn. 320; *Petcher v. Hennessey*, 48 N. Y. 415. But equity will not disturb a compromise between the parties because of mistake of fact or law as it seeks to discourage litigation, and especially where the matter compromised affects the honor

The ignorance of law which does not excuse, is ignorance of the law of the land, and not ignorance of the law of another state or country. Ignorance of the law of a foreign state, and of private statutes is treated as mistake of fact.* When a party has been led to make a mistake by a void statute, equity will relieve as far as possible.** But when the contract is made under a mistake of law produced by an erroneous decision, there is considerable conflict of authority. By some authorities the courts will give relief;*** and by others the parties are refused relief in equity.****

When, due to a mistake of law, money is paid by one with full knowledge of all the facts, to another claiming the same, and there is neither fraud or misrepresentation in the case, the person making the payment cannot recover the money paid either in law or equity.***** But some courts are inclined to treat the

of members of a family. *Stapilton v. Stapilton*, 1 Atk. 10; *Casy v. Casy*; 11 Ir. Eq. R. 327; *Leach v. Fobes*, 11 Gray, 506.

**Haven v. Foster*, 9 Pick. 111; *Morgan v. Bell*, 3 Wash. 576; *Pomfret v. Windsor*, 2 Ves. Sr. 472; *Williamson v. Hitner*, 79 Ind. 233; *Bledsoe v. Nixon*, 68 N. C. 521; 60 Ga. 391; 38 Pa. St. 194.

***Harney v. Charles*, 45 Mo. 157.

****Jones v. Munroe*, 32 Ga. 181; 45 Mo. 157.

*****Jacobs v. Morange*, 47 N. Y. 57; *Kelly v. Turner*, 74 Ala. 513.

******Rogers v. Ingham*, L. R. 3 Ch. Div. 351; *Livermore v. Peru*, 55 Me. 469; *Erkins v. Nicolin*, 39 Minn. 461.

ignorance of the law as mistake of fact, and if so treated the money may be recovered in equity.*

Sec. 1154. SAME SUBJECT—MISTAKE OF FACT.—The right of a court of equity to give relief when a contract has been made through ignorance or mistake of fact is unquestioned. There is no general presumption that a man knows any fact, and whether a particular fact was or was not within the knowledge of a particular person at a given time, is to be inferred from the surrounding circumstances. The mistake may arise from ignorance of the existence of some fact, past or present, which the parties believed did not exist, or from the belief that it did exist, or once existed, when in truth it did not exist, or had never existed. Ignorance of fact and mistake of fact are commonly used as equivalent expressions.**

“A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake, the complainant

*Northrop v. Graves, 19 Conn. 548; Covington v. Powell, 2 Met. (Ky.), 226; Cobb v. Cole, 44 Minn. 278.

**Strictly speaking, ignorance implies a total want of knowledge, and hence a total absence of consideration of that particular fact in making the contract, while a mistake of fact implies some knowledge, but more or less defective, resulting in an erroneous conclusion or judgment on the part of the person possessing such imperfect information. Canal Bank v. Bank of Albany, 1 Hill, 287.

would not have assumed the obligation from which he seeks to be relieved.”*

When there is a mutual mistake, going to the essence of the contract, the court will grant relief, even if there is an entire absence of all evidence of deceit, fraud or misrepresentation.** In the United States it is generally held that when the mistake or ignorance is due to the negligence of the party complaining, equity will not grant relief; while in England the rule is more liberal, and equity will not refuse relief because at the time the mistake was made the party had the means of knowledge within his power. The doctrine of laches or delay not applying in this case either in law or equity.*** The negligence, however, must amount to the violation of some duty. And if there has been negligence, and the opposite party has not suffered injury thereby, relief will not be granted.****

The fact must be material to the contract, and not extrinsic to it, or no redress can be given.***** So if

*In *Grymes v. Sanders*, 93 U. S. 55; *Brigham v. Brigham*, 1 Ves. 126; *Smith v. Evans*, 6 Binney, 102.

***Hitchcock v. Giddings*, 4 Price, 135; *Colyer v. Clay*, 7 Beav. 188; *Fane v. Fane*, L. R. 20 Eq. 698; *Allen v. Hammond*, 11 Pet. 63.

****Brown v. Fagon*, 71 Mo. 563; *Grymes v. Sonders*, 93 U. S. 55; *Conners v. Welch*, 51 Wis. 431; *Troops v. Snyder*, 70 Ind. 554; *Kelly v. Solari*, 9 M. & W. 54; *Redgrove v. Hurd*, 20 Ch. Div. 1.

*****Bank v. Burdick*, 87 N. Y. 40; 54 Conn. 488; 10 Wheat. 333; 42 Ia. 157; 6 H. & J. (Md.), 500.

******Fox v. McRoth*, 3 Bro. C. C. 45; *Turner v. Harvey*, Jacob, 178; *Laidlaw v. Organ*, 2 Wheat. 178.

both parties stand upon the same footing as to a material fact, and have the same means of obtaining accurate means of information, and where the fact is of a doubtful nature and cannot be positively or accurately known, neither party can complain even if the bargain resulting is unfavorable to him.* Again, it is a rule of evidence that the terms of a written instrument cannot be varied by parol, as by adding to or subtracting from the terms of a written instrument, but in equity, where a written instrument by accident or mistake in fact contains something, or fails to contain something, which results in the contract being different from what it was intended to be, it will be rectified. Equity not permitting the rule to accomplish what it was intended to prevent,—a fraud. The party applying to have such a written agreement reformed or corrected must show by conclusive proof that a mistake has been made, that it is mutual, or rather that the written agreement does not embody the terms of the verbal contract as understood by both parties. The fact that at the time the writing was executed one of the parties knew that it did not set forth the contract agreed upon, will not prevent the other party from obtaining relief.** But when the mistake is only as to one of the parties and the written agreement correctly represents the contract as

**Mortimer v. Capper*, 2 Bro. C. C. 156; *Sullen v. Ready*, 2 Atk. 592.

***Davis v. Simonds*, 1 Cox, 402; *Irnham v. Child*, 1 Bro. C. C. 92; *Gillespie v. Moon*, 2 John Ch. 586; *Hilmer v. Smith*, 77 N. Y. 226.

understood by the other, such contract cannot be rectified. It may possibly be rescinded on the ground that the minds of the parties did not meet, and that therefore in fact they did not enter into contract relations.*

It is to be remembered that in all cases where a party seeks to be relieved from an obligation on the ground of accident, mistake or fraud, he must have superior equities to the party against whom he brings his action, since if the equities are equal the law must prevail.** Thus if one makes improvements on land supposing that he owns the land, he cannot recover the value from the true owner, who was at the time of the improvements a minor.***

Sec. 1155. FRAUD AS A GROUND FOR EQUITABLE RELIEF.—The jurisdiction of equity in cases of fraud is largely concurrent, since courts of law also give relief. In those cases where the law courts originally gave full, adequate and complete relief equity does not assume jurisdiction.**** At law

**Dulany v. Rogers*, 50 Md. 524.

***Anderson v. Tydings*, 8 Md. 427; *Smith v. Turrentine*, 2 Jones Eq. 253.

****Guckian v. Riley*, 135 Mass. 71; *Peters v. Florence*, 38 Pa. St. 194. See, *Pomeroy's Eq. Jur. Secs. 868-871*.

****The jurisdiction of equity courts is divided into concurrent, exclusive and auxiliary. Originally there were only a few matters in which the court had concurrent jurisdiction, while now there are a number in which each court has jurisdiction, the equity courts still maintaining their jurisdiction, though the law courts have by enabling statutes also assumed jurisdiction. *Sweeney v. Williams*, 36 N. J. Eq. 627; 85 Ill. 341; 136 Mass. 273.

the remedy of the party defrauded is either to treat the contract as rescinded, and bring an action to recover the money or property parted with, or allow the transaction to stand and sue for the damages sustained by reason of the fraud, or where the agreement is to perform an act or pay money, he may refuse to carry out the agreement and set up the fraud as a defence in an action for breach. In equity the party defrauded may have the deed or other instrument procured by fraud rescinded, or reformed so as to constitute the true bargain, or if loss has been sustained, in a proper case, have an accounting, or set up the fraud as a defence to an action brought against him.

Fraud is difficult to define, and is usually left to be determined from the facts and circumstances in each particular case, it may be said to be any deception or circumvention which affects injuriously the legal rights or title of another.*

In an early leading case (*Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125), Lord Hardwicke divided fraud into four classes:—1. Fraud arising from facts and circumstances of imposition. 2. Fraud apparent from the intrinsic nature and subject of the bargain itself; inequitable and unconscientious bargains. 3. Fraud which is presumed from the circumstances of the parties contracting. In this class of frauds, equity courts go further than courts of law, for the latter require the fraud to be proved, while the former pre-

**Mortlock v. Buller*, 10 Ves. 292; *Parker Hist. Ch.* p. 508.

sume it exists in the absence of proof to the contrary.
 4. Frauds which are inferred from the nature and circumstances of the transaction, since third parties are defrauded.

Fraud is also usually divided into the two classes:
 —1. Actual Fraud. 2. Constructive Fraud. The former including the cases in the first division of Lord Hardwicke, and the latter including the other three of Lord Hardwicke's divisions.

Sec. 1156. SAME SUBJECT—ACTUAL FRAUD.
 —One of the largest classes of cases with which equity courts have to do is where the fraud results from misrepresentation. It is held that whenever one party intentionally or designedly misrepresents a material fact or produces a false impression whereby another is misled or entrapped and an undue advantage obtained over him, there is a case of actual positive fraud.* In order that a misrepresentation may constitute a fraud, it must be: 1. Untrue; 2. Made for the purpose of inducing the other party to act; 3. Stated as a fact; 4. Material; 5. Relied upon by him to whom it was made. If the statement was true there could not of course be fraud. While it must be for the purpose of inducing the other party to act, it need not be to induce any particular person, but suffices if the intention was to deceive any person or persons.** If

*Hill v. Lane, L. R. 11 Eq. 215.

**Eaton v. Avery, 83 N. Y. 31; Rothschilder v. Knick Ins. Co. 76 N. Y. 216; Kisch v. R. R. 3 DeG. & J. & S. 122; L. R. 2 H. L. 99.

the statement is made as a mere opinion instead of a fact, it is not a fraud.* If the fact is material, and one on which if the party deceived had been correctly informed the contract would not have been made, it will be a fraud, whether the party making the misstatement knows it to be false, or whether he is simply ignorant, when it was his duty to have ascertained the exact truth.** If the party complaining has not been misled, as where he knew that the representation was false at the time it was made, or has not been misled to his prejudice or injury by the misrepresentation, equity will not consider his complaint.***

It is also said that the statement or false representation relied upon must have been entitled to credence, or the party deceived must have been justified in relying on it, but he is not obliged to investigate or probe statements made by the other party as facts and upon such party's faith and credence.**** It is a rule that where the statements constituting the misrepresentation are within the knowledge of the party making

*Doggett v. Emerson, 3 Story, 700; Pike v. Fay, 101 Mass. 134; Haygarth v. Wearing, L. R. 12 Eq. 320.

**Pulsford v. Richards, 17 Beav. 87; Rawlins v. Wickham, 3 DeG. & J. 304; Iron Co. v. Trout, 83 Va. 397; 14 Mich. 109; 37 Ind. 1; 147 Mass. 403.

***Nelson v. Stocker, 4 DeG. & J. 458; Redgrove v. Hurd, L. R. 20 Ch. Div. 1; Smith v. Chadwick, L. R. 20 Ch. Div. 27; 33 W. Va. 624; 22 Or. 29; 98 Mo. 598; 40 Ia. 286; 135 Ind. 655.

****Leyland v. Illingworth, 1 DeGex, F. & J. 248; Boynton v. Hazelboom, 14 Allen, 107; Rorer v. Front, 83 Va. 397.

them, or his supposed knowledge, and not within the knowledge of the other, the injured party will be given relief, while if the complaining party had the opportunity to investigate and verify the knowledge and forms an opinion from such investigation, or had equal means of knowledge relief will be denied.*

Fraud may also result from the suggestion of a falsehood or the suppression of the truth. The suggestion of a falsehood differs merely in the manner of conveying the untruth from a misrepresentation, and the same rule applies. While in reference to the suppression of the truth the rule is different. If the relation of the parties is such that one is under no obligation, legal or equitable, to communicate his special information, the failure to do so will not constitute fraud, although the contract may be a hard one, and would not have been executed if both parties had been equally informed.** Where the fraud complained of results from suppression or concealment, the complainant must show either, that the relation existing between them was such that it was the defendant's duty to disclose the truth, or that in the particular transaction he reposed special confidence in the defendant, and the defendant was aware of the special

*Chapman v. Shillito, 7 Beav. 146; Attwood v. Small, 7 Cl. & F. 232; Clapp v. Hoffman, 28 Atl. Rep. 362.

**Fox v. Mackreth, 2 Bro. C. C. 420; Turner v. Harvey, Jacob, 178; De Costa v. Scandret, 2 P. Wms. 170; Dambmann v. Schulting, 75 N. Y. 55.

confidence, or that the transaction itself was one which required the defendant to make a full disclosure.*

In reference to that class of frauds arising from the peculiar situation of the injured party, it may be said that to make the contract valid, the consent of the party which is one of the essential elements of the contract, implies, physical power, moral power, and a free use of those powers. Hence if a contract is made by a person who under the circumstances could not have given a legal consent, it cannot be enforced to his detriment. In this class of persons, are persons, *non compos mentis*, that is, lunatics, drunkards, imbeciles, etc. When such persons have been contracted with, and any undue advantage has been taken, equity will grant relief.** So contracts made under duress, or in cases of extreme necessity by infants, married women, sailors, and the like, fall in this class, and each will be relieved from such contracts if the other party took undue advantage.*** But to rescind such contract the injured party must act promptly, and not perform after learning of the advantage taken of him, or the agreement cannot be rescinded.****

The party defrauded by reason of the misrepresen-

*Howard v. Gould, 28 Vt. 523; Hadley v. Clinton, 13 Ohio St. 502; Potter's Appeal, 56 Conn. 1.

**Clarkson v. Kitson, 4 Grand (Up. Can.), 244; Kelly v. Smith, 73 Wis. 191; 94 U. S. 506; 63 Md. 371; 72 Mich. 420.

***Francis v. Wilkinson, 147 Ill. 470; 44 Ia. 679; Farmer v. Farmer, 1 H. L. Cas. 724; 120 N. Y. 614.

****Woodcock v. Bennett, 1 Cow. 711; Merrill v. Wilson, 66 Mich. 232.

tation or suggestion of another, has the option of compelling the defendant to make such statement good when that can be done.* And the defendant cannot retain what he has secured by the fraud, nor can his grantee or vendee unless such purchaser has obtained it without notice of the fraud and for value. "A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but from his children and his children's children, or from any persons amongst whom he may have parceled out the fruits of his fraud."**

Sec. 1156. SAME SUBJECT—CONSTRUCTIVE FRAUD.—In all cases of actual fraud the defendant is guilty of some moral turpitude, while in cases of constructive fraud he is not necessarily guilty of moral turpitude. By constructive frauds are meant acts and contracts which, although not really designed by the parties thereto to work a positive fraud and injury upon another person, yet have a general and manifest tendency to mislead such person, or are detrimental to the public interests. Such frauds are, in equity, as reprehensible as positive frauds.

Constructive frauds may be divided into three classes: 1. Contracts made in violation of some statute, or of some general public policy, or the policy of the law.

**Pulsford v. Richard*, 17 Beav. 87; *Rowlins v. Wickham*, 3 DeG. & J. 304; L. R. 9 Ch. 397; *Piper v. Hoard*, 107 N. Y. 73.

***Vane v. Vane*, L. R. 8 Ch. Div. 383; *Huguenin v. Base-ly*, 14 Ves. 273.

2. Contracts which owe their existence to the abuse of a confidential and fiduciary relation existing between the parties. 3. Contracts which unconscionably and injuriously affect the private rights, interests and duties of the parties themselves or third persons. These will now be considered in succession.

Sec. 1157. SAME SUBJECT—I. CONTRACTS MADE IN VIOLATION OF SOME STATUTE.—

There are many acts that are not *malum in se*, but which for the good of the public and the protection of the weak and unfortunate, are prohibited. Thus usury was at the early common law forbidden, but now by statute the penalty for taking more than the statutory rate of interest is a mere forfeiture of the excess of interest so taken. At common law a wager was not unlawful while a gambling consideration was. By statute now gaming and wagering agreements are alike illegal and void.* So agreements for the purchase of grain or stock in the future, where there is no intent that there shall be any actual purchase or delivery, but a mere settlement, the purchaser's gains or losses depending upon whether the stock or grain bought has advanced or fallen in the market, are voidable.** A contract to be enforced in another state, made in violation of the laws of that state, will not be enforced.***

*Wilkinson v. Tousley, 16 Minn. 299, 10 Am. Rep. 139.

**McGrew v. City Prod. Ex. 85 Tenn. 572; Harvey v. Merrill, 150 Mass. 1; Harris v. White, 81 N. Y. 532.

***Chambers v. Church, 14 R. I. 398; 51 Am. Rep. 410.

Sec. 1158. SAME SUBJECT—2. CONTRACTS MADE IN VIOLATION OF PUBLIC POLICY.—

Under this head fall marriage brokage contracts, contracts in restraint of trade or marriage generally, and contracts with the object of private gain at the expense of the public service, and for controlling or influencing legislative, judicial or administrative functions. These have all been discussed in this Series in Vol. IV., under the head of Contracts, to which subject the student is referred.

By a marriage brokage contract is meant where a person engages another for reward to negotiate a marriage for him, such contracts are absolutely void, and the reward of course cannot be collected, and if paid cannot be recovered.*

So it is held that any secret disposition of property by either of the parties to a marriage contract, made for the purpose and with the intent to deprive the other of the interest in same accruing from the marriage, is a fraud upon the other party.** But to enable the husband to set aside the ante-nuptial convey-

*Roberts v. Roberts, 3 P. Wms. 67; Cole v. Gibson, 1 Ves. Sr. 503; Duval v. Wellman, 124 N. Y. 156; Williamson v. Gihon, 2 Sch. & Lefoy, 356. In the last case the court cancelled bonds given by a husband after marriage to one who assisted him in eloping with the woman he married, on the ground that it was a fraud on the wife, from whose property the bonds might have to be paid. But the true ground of the objection to such contracts is that they tend to annul the free consent of the parties.

**Gale v. Lindo, 1 Vern. 475; Neville v. Wilkinson, 1 Bro. C. C. 543.

ances of the wife he must show: 1. That marriage was in the contemplation of the parties at the time of the conveyance; 2. That the woman executed such conveyance in contemplation of the marriage; and 3. That the conveyance was concealed from the husband.*

While conditions annexed to legacies, gifts and devises in restraint of marriage generally are void, yet if they are reasonable in themselves and do not operate as an undue restraint upon marriage they will be upheld.** So a restraint annexed to devises restraining a widow or widower from marrying generally are upheld.*** And conditions precedent annexed to a devise of land prevent the title from vesting until the condition has been performed, regardless of the fact whether they are in restraint of marriage or are illegal or impossible.****

An agreement between husband and wife to separate and live apart was formerly void as against public policy, but now by statute and otherwise, such an agreement made upon sufficient consideration and in

*Bigelow on Fraud, 49-51; *Strathmore v. Bours*, 1 Ves. Jr. 22; *Goddard v. Snow*, 1 Russ. 485. So antenuptial conveyances of the husband to defeat the wife's dower will be set aside in equity upon the application of the wife. *Kelly v. McGrath*, 70 Ala. 75; *Leach v. Duvall*, 8 Bush. 201; *Cranson v. Cranson*, 4 Mich. 230; 35 Mich. 415; 3 Del. Ch. 99.

***Scott v. Tyler*, 2 Bro. C. C. 431; *Story*, Eq. Jur. Sec. 274; Bigelow's notes.

****Allen v. Jackson*, L. R. 1 Ch. Div. 399; 6 Mass. 169.

*****Commonwealth v. Stauffer*, 10 Pa. St. 350; 6 Mass. 169.

valid form will be enforced to the extent of preventing either from interfering with the other in violation of the agreement.*

Contracts for the purpose of restraining trade generally, are void as against public policy, for the reason that they tend to promote monopolies and to prevent a just and healthy competition. This includes all contracts or agreements or combinations like trade unions, trusts, corners, or any scheme to embarrass trade generally, or in a particular article; or to enhance the value of any commodity for the benefit of a few individuals. They are all alike void, incapable of being enforced, and in addition equity will enjoin their continuance.**

But contracts merely intended to protect the good will of a business for the benefit of a purchaser, as where the vendor agrees not to establish a similar business within a limited territory, or for like purposes, will be enforced if reasonable; the question of reasonableness in such cases being for the court in equity procedure.***

*Wilson v. Wilson, 1 H. L. Cas. 538; 5 H. L. Cas. 40; Clark v. Fosdick, 118 N. Y. 7, 16 Am. St. Rep. 733.

**Mitchel v. Reynolds, 1 P. Wms. 181; Stanton v. Allen, 5 Denio, 434; Gale v. Kalamazoo, 23 Mich. 344; Crawford v. Wick, 18 Ohio St. 190; Rigby v. Connol, L. R. 14 Ch. Div. 482; Sampson v. Shaw, 101 Mass. 145; Central, Etc., Co. v. Guthrie, 35 Ohio St. 666; Wiggins, Ferry Co. v. R. R., 5 Mo. App. 347; Arnott v. Pittson, 68 N. Y. 582; Craft v. McConoughy, 79 Ill. 346; Emery v. Ohio, Etc., Co., 47 Ohio St. 320; Chicago Gas. Co. v. Co., 121 Ill. 530.

***Taylor v. Blanchard, 13 Allen, 370; Hubbard v. Hiller,

When public contracts are left to the lowest bidder, any agreement or plan among the bidders to increase the cost of the work for their own benefit will be void. So if goods are sold at auction, and the sale is not fair, as where puffers are employed, the sales so made may be avoided.*

Another class of contracts void as against public policy, are those whose purpose and object is some private gain or emolument at the expense of the public service, or which seek to secure the election of some particular person, or which interfere with the freedom of elections, or which are made for the purpose of influencing legislative will, or to secure the appointment of some particular person to office, or to influence or control executive or administrative functions, or for influencing or controlling judicial proceedings.** But contracts made for the clear purpose of benefiting private persons, and not affecting injuriously the interests of the public may be valid.*** So it is an immemorial right of citizens to petition the legislature for a redress of grievances, as well as to

27 Mich. 15; 52 Ia. 241; 7 Daly, 354; 47 Ia. 137; 68 N. Y. 300; 43 Fed. Rep. 208; 106 N. Y. 473.

*Weld v. Lencoster, 56 Me. 453; Atcheson v. Mallon, 43 N. Y. 147; Peck v. List, 23 W. Va. 338.

**McGuire v. Corwine, 101 U. S. 108; Gaston v. Drake, 14 Nev. 175; Gurnsey v. Cook, 120 Mass. 501; 135 U. S. 507; 37 Cal. 168; 14 Bush. 755; 129 U. S. 643; 7 Mo. App. 165; 89 Ill. 349; 41 Kans. 364; 72 Ia. 130; Law v. Law, 3 P. Wms. 392.

***48 Ia. 211; 93 U. S. 548; 79 Ill. 310; 103 U. S. 261.

appeal to the legislature as a whole or any of its committees and urge the passage of any particular act. These things a citizen may do in person or by attorney, but contracts to secure the votes of particular members of the legislature through personal appeals to them, individually "lobbying", are void.*

Contracts contrary to good morals, are also void. These include contracts based on illicit intercourse; leases of premises to be used for unlawful purposes; contracts compounding a felony, or to forbear from prosecution of a criminal case, or to abandon a criminal prosecution already commenced, and at common law contracts amounting to champerty or maintenance.**

Sec. 1159. SAME SUBJECT—3. CONTRACTS ARISING FROM ABUSE OF CONFIDENTIAL OR FIDUCIARY RELATIONS.—Equity will grant relief, as a general rule, wherever one has reposed a confidence or trust in another, and such confidence or trust has been abused. The classes of persons who stand in a confidential or fiduciary relation to each other are:—1. Parent and child. 2. Guardian and ward. 3. Physician and patient. 4. Clergyman and parishioner. 5. Attorney and client. 6. Trustee and

**Marshall v. R. R.*, 16 How 314; *Mills v. Mills*, 40 N. Y. 543; 22 Kan, 692.

***Batty v. Chester*, 5 Beav. 103; *Gray v. Mathias*, 5 Ves. 286; *Powell v. Knowles*, 2 Atk. 224; *Newby v. Sharpe*, L. R. 8 Ch. Div. 39; 42 Ill. 198; 78 N. C. 328; 50 Vt. 657; 48 Cal. 74; 131 Mass. 436; 70 Ala. 174.

cestuy que trust. 7. Principal and agent. In all cases falling under one of these classes, the burden of proof is upon the party in whom the confidence is reposed to show affirmatively that no undue advantage has been taken of the other. If the contract is not a fair one it will be presumed, until removed by proof, that it was not fairly made.*

1. Parent and Child. Equity scrutinizes carefully all contracts between parent and child, and to be sustained they must be reasonable and characterized by perfect good faith.** A child is presumed under parental influence as long as the dominion lasts, so that a transaction entered into shortly after the child becomes of age, or while still living at the parental home it comes within the rule. But after the child is fully emancipated in law and fact, the rule no longer applies.*** This relation is reversed when the parent has become aged and enfeebled and the child has driven a hard bargain with such parent, and such a contract may be avoided.****

*Tate v. Williamson, L. R. 2 Ch. 55; Rhodes v. Bates, L. R. 1 Ch. 252; Cowee v. Cornell, 75 N. Y. 91; 81 Ala. 530. Equity will not allow a person abusing the confidence reposed in him to retain the advantage of the transaction, although the matter could not have been impeached if no such confidential relation had existed.

**Kempson v. Ashbee, L. R. 10 Ch. App. 15; Savery v. King, 5 H. L. Cas. 627; 96 N. Y. 414; 72 Mo. 669.

***Wright v. Vanderplank, 8 DeG. M. & G. 133; Miller v. Simonds, 5 Mo. App. 33; 46 Ia. 684; 96 N. Y. 414; 120 Ill. 277.

****Highbeger v. Stiffler, 21 Md. 338; 5 W. Va. 188; 40 Mich. 473.

2. Guardian and Ward. While this relation continues the parties may not contract with each other at all, and courts of equity go still further and do not allow the parties to contract immediately after the relation has terminated, unless there is perfect good faith on the part of the guardian, and careful deliberation on the part of the ward.* This rule applies to settlements between such parties, and applies where the relation subsists in fact and not in law.** After the relation has fully ended, and the ward is fairly emancipated and independent of his former guardian, the former relation will cease to raise a presumption of fraud in their contracts.***

3. Physician and Patient. The same principles are applicable to this relation, and a physician dealing with his patient is bound to use the utmost good faith and fair dealing or contracts made under such conditions will be set aside in equity. (*Billage v. Souther*, 9 Hare, 534.)

4. Priest and Parishioner. Courts of equity look with suspicion on all contracts made between the priest and parishioner, as well as contracts made under the advice of the priest, since the relation is a peculiarly confidential one and easily abused. There

**Pierce v. Waring*, 1 P. Wms. 121n; *Hatch v. Hatch*, 9 Ves. 292; 100 Ill. 356; 10 H. L. Cas. 26; 52 Ala. 430.

***Say v. Barnes*, 4 Sar. & R. 112; 44 Mo. 465; 129 U. S. 663; 126 Ill. 310; 110 Pa. St. 349; 89 Cal. 575; 56 Mich. 166.

****Bickerstaff v. Marlin*, 60 Miss. 509; 129 U. S. 663.

is no distinction as to sect or denomination of the parties.*

5. Attorney and Client. While an attorney may contract with his client for the purchase of land or chattels, equity obliges the attorney to show in the first instance that the dealing was fair and no advantage was taken of the client, and if this appears the contract will stand.* But gifts from the client to the attorney while the relation exists are void, if made *inter vivos*, while testamentary bequests may stand if the testator's capacity and freedom to act clearly appear.**

An attorney, aside from his fees, is not entitled to make any profit out of his employment. Whatever he makes is made for his employer. If he conducts a judicial sale he cannot become a purchaser for himself without the consent of his client obtained after a full disclosure of all matters affecting the transaction.*** And these rules apply not only to attorneys-at-law, but to all persons occupying substantially the same position of trust and confidence.****

*Lyon v. Home, L. R. 6 Eq. 655; Connor v. Stanley, 72 Cal. 556; 70 Mo. 580; 44 Ia. 679.

*Holman v. Loynes, 18 Jur. 839; Hobday v. Peters, 28 Beav. 439; Gibson v. Jeyes, 6 Ves. 266; 97 Mo. 509.

**Morgan v. Minett, L. R. 6 Ch. Div. 638; Hatch v. Hatch, 9 Ves. 292; Greenfield's Estate, 14 Pa. St. 489; Walker v. Smith, 29 Beav. 394; 95 N. Y. 516; 91 N. Y. 539.

***Tyrell v. Bank of London, 10 H. L. Cas. 26; 18 Ves. 120; 41 Mich. 227; 62 Pa. St. 461; 122 Ill. 607; 56 Mich. 285; 101 U. S. 189.

****Velletto v. Tedeme, 122 Ill. 607; L. R. 1 Eq. 528.

6. **Trustee and Beneficiary.** A trustee cannot acquire for himself an interest in trust property, and if he does so the transaction is void.* This relation will be discussed further in the next chapter.

7. **Principal and Agent.** The agent's relation to his principal is much the same as that of the trustee to his beneficiary. Equity will not permit him to act for two principals whose interest are conflicting without the consent of both. He may not make anything out of his employment except his wages, and if employed to sell property he cannot become the purchaser directly or indirectly.**

Sec. 1160. SAME SUBJECT—4. **CONTRACTS WHICH AFFECT INEQUITABLY THE RIGHTS OF THE PARTIES OR THIRD PERSONS.**—Under this head may be classed the following:—

1. **Sailors.** Sailors are regarded as special wards of the chancery, since their life in all ages has tended to make them careless and reckless in matters where others are prudent. The civil law protected them to the extent that they must receive at least half the benefit of the thing sold; equity looks to the whole circumstance and if the contract made is inequitable it will set it aside.***

**Romaine v. Hendrickson*, 27 N. J. Eq. 162; 55 Cal. 91; 22 W. Va. 678.

***Scribner v. Collar*, 40 Mich. 375; *Murry v. Beard*, 102 N. Y. 508; *Hagenmyer v. Marks*, 37 Minn. 6.

****How v. Weldon* 2 Ves. Sr. 516; *Taylor v. Rochfort*, 2 Ves. Sr. 281.

2. Heirs, Reversioners, and Expectants. Equity will not permit harsh bargains to be driven with this class of persons, and will presume that the injured expectant was in distress, and was unduly influenced thereby to make the contract, which, if inequitable will be set aside.*

3. Post Obit Bonds. By *post obit bonds* is meant agreements to pay, in consideration of a sum of money received, a sum in excess of the amount received and interest thereon, on the death of some person from whom the obligor expects to receive an inheritance. Equity will cancel such obligation, the obligor paying what is equitably due thereon.**

4. Contract of Suretyship. By suretyship one becomes liable for the debt of another, and equity requires good faith on the part of the debtor and the creditor, both of whom are benefited by the contract. If any material fact is concealed from the surety by the other parties, equity will relieve the surety from his obligation.*** While the creditor need not volunteer information, he is bound to inform the surety of all material facts touching the transaction for which the surety becomes liable, and if this is not done the

*Morrill v. Snelling, 15 Ch. Div. 679; Butler v. Duncan, 47 Mich. 94.

**Boynton v. Hubbard, 7 Mass. 112; Chesterfield v. Janssen, 2 Ves. 124.

***Davis v. London, Etc., Ins. Co., L. R. 8. Ch. Div. 469; Dennison v. Gibson, 24 Mich. 186; 35 Mich. 525; 72 Pa. St. 372.

surety cannot be held.* So after the suretyship contract is complete, equity still requires nothing to be done by the creditor to enlarge the risk of the surety, as giving time absolutely, surrendering collateral securities, and the like.**

5. Composition with Creditors. Equity requires that when a debtor enters into an agreement with his creditors whereby they agree to discharge their debts against him upon the payment of a certain per cent of their respective claims, that there shall be perfect good faith, and that no advantage shall secretly be given one over the other, since equality is equity. If any undue and secret advantage has been given, such preference will authorize the court to set aside the deed of composition.*** Such agreement is a fraud upon the others; so any arrangement between a bankrupt and his assignee to withdraw a part of the property from the assets for the bankrupt or his family is a fraud on creditors.**** But after a composition with

**Hamilton v. Watson, 12 Cl. & Fin. 109; Pidcock v. Bishop, 3 B. & C. 197; 11 Wheat. 59; 33 Mich. 410; Owen v. Homan, 4 H. L. Cas. 997.

***Wright v. Simpson, 6 Ves. 714; 6 Ves. 805; Boulty v. Stubbs, 18 Ves. 20; Hagey v. Hill, 75 Pa. St. 108. See also the subject of Suretyship in No. 6 Home Law School Series.

*Cullingworth v. Loyd, 2 Beav. 385; 4 East, 372; 8 Met. 27; 41 Am. Dec. 503.

**Miller v. Sauerbiner, 30 N. J. Eq. 71; McNeil v. Co-hill, 2 Bligh. 228.

creditors or discharge in bankruptcy a creditor may be paid in full by the debtor.*

6. Fraudulent Conveyances of Property. Equity will not allow a debtor to dispose of his property with intent to defraud his creditors. And such a transfer was voidable at common law by a creditor. When the transfer is made upon a valuable consideration the actual intent to defraud must be shown.** When the conveyance is voluntary, there is a presumption that it was made with a fraudulent intent, but this presumption may be overcome*** So a conveyance of property to defraud future creditors is void, but in this class of cases the evidence of the fraudulent intent must be clearly shown.****

*Argall v. Cook, 43 Conn. 160.

**Kevan v. Crawford, L. R. 6 Ch. Div. 29; Bulmer v. Hunter, L. R. 8 Eq. 46.

***Sexton v. Wheaton, 8 Wheat. 229; Lerow v. Wilmarth, 9 Allen, 382; Vesplank v. Story, 12 Johns, 536.

****Case v. Phelps, 39 N. Y. 164; Mullen v. Wilson, 44 Pa. St. 413. The matter is largely controlled by statutes in the various states.

CHAPTER IV.

PROPERTY IN EQUITY—TRUSTS AND USES.

Sec. 1161. ORIGIN OF USES AND TRUSTS.

—The origin of *uses* and *trusts* is traced back to the civil law, but yet the equity judges are indebted to the Roman jurists for little more than the bare idea. Under the civil law a testator was permitted to name or designate his heir, and such heir took with the estate of the testator all the liabilities existing at his death. That is, he fell heir to both property and debts, and was even liable for the debts when there was no property, or less property than was required to pay the debts. The law assuming that the legal existence of the testator was prolonged by placing the heir in the exact legal status occupied by the testator. The testator was also restricted in his choice of an heir to certain persons, so that it resulted that certain persons could acquire property by purchase or gift that could not do so by testament. To evade this rule of the civil law, wills were drawn making a qualified person the testator's heir, but requesting such person to transfer the estate to some other person, who could not have been named as heir directly.*

*Sander's Justinian, 245-280. At first it was left to the conscience of the heir to carry out the directions of the testament, but after a time the courts interfered and compelled a compliance. Id. 337-8. Since the heir was liable for the

Trusts owed their origin in England to certain conditions which were inserted in deeds for the purpose of evading the statute of Mortmain. Prior to the statute of Uses, a simple gift of land to a person and his heirs, accompanied by livery of seizin, conveyed to such person an estate in fee simple, and no consideration was necessary to support the gift. At that time no estate in land except an estate at law was known. The statute of Mortmain prohibited the giving of lands to religious houses. This statute was evaded by an ingenious device of the conveyancers, by making the grant of the land to some qualified person with livery of seizin, *for the use and benefit* of the religious house which the donor or grantor desired to assist. At law the person receiving the gift and the livery of seizin was the owner of the fee unconditionally, the use expressed in the deed was void, being in derogation of the grant. But in equity, where the intent rather than the words and acts of the grantor were regarded, it was held that while the grantee was the owner of the fee, he was required as a matter of good faith and conscience to turn over to the person entitled to the use of the lands the income of such lands. This was called a use or trust, and

debts of the testator, it was customary for him to take back a bond from the person to whom he was directed to transfer the property requiring such person to pay the debts. In A. D. 62, during the reign of Emperor Nero, a statute was passed which made the beneficiary, and not the heir, liable for the testator's debts, and thus the equitable estate of the beneficiary was fully established.

the estate of the person entitled to the use or trust, an *equitable estate*. This equitable estate was in fact, under this construction of the deed, the entire beneficial interest in the land, the grantee holding the bare legal title.

In a short time conveyances to uses were made for other purposes than to evade the statute of Mortmain. Turbulent barons and other landed proprietors, who in that troublous time were in continual danger of having their estates confiscated by siding with the wrong dynasty, found it politic to have the legal title to their estates held by some person for their use. This plan was adopted by so many proprietors that the wholesome fear of confiscation was fast losing all influence in the government, and in the reign of Henry VIII, parliament passed a law to regulate uses, called the Statute of Uses. (27 Hen. VIII, c. 10.) This statute provided that when any person shall stand seized of any lands or hereditaments to the use of some other person, the person entitled to the beneficial use shall be deemed to be in lawful seizin of such lands. The object of the statute was to reunite the legal and equitable estate in the same person. Thus, if lands were granted to A, for the use of B, before the Statute of Uses, A took the legal estate and B the equitable estate, but after the passage of the statute the legal estate did not remain in A, but passed through him to B immediately.

The conveyancers, not to be outdone, added another

er link to the chain of grantees, and made a conveyance to A, for the use of B, and then added, "to the use of C," or "in trust for C." The common-law courts decided that a use could not be limited upon a use; that is, that the statute converted the first use into a legal estate, but thereby exhausted its power, leaving the second trust or use unaffected.* While the chancery courts, following their former holdings, preserved the intent of the grant, and upheld the trust, making an equitable estate identical with the former use, which the law refused to recognize. So that the effect of the statute of uses was utterly futile, except to add several words to a conveyance.**

Sec. 1162. CLASSIFICATION OF TRUSTS.—Trusts may be classified as follows:—1. Express trusts; that is, those created by the intentional acts of the parties. 2. Implied or constructive trusts; that is, created by operation of law.*** Express trusts may be either (a) private or (b) public; that is, they may be created for the benefit of some private individual,

*Tyrrell's Case, 2 Dwyer, 155a; 1 White & T. Lead. Cas. Eq. 335.

**Hopkins v. Hopkins, 1 Atk. 591; Sugden, Gilbert on Uses, p. 63; Kerley's Hist. Eq. pp. 132-3; 6 B. & C. 305; 13 E. C. L. 180.

***A trust may be created by the act of the party which clearly expresses an intent to create a trust, or a trust may be created by an act which does not openly express any intention to create a trust, but from which the law implies a trust; hence law writers have divided trusts into two great classes: express trusts, and implied, resulting or constructive trusts. Lewin, Trusts, p. 188.

and neither the general public nor any particular class of the public may have any interest therein, or the trust may be created expressly for the general public or some particular class or portion of the public. For this reason express trusts are divided into two classes, *private trusts*, and *public trusts*, or *charities*.

Express private trusts are again divided into two classes, *pure* and *special*.* A *pure* or *passive* trust is one where property is conveyed to one person for the use and benefit of another, with no power or authority to manage the same except as directed by the beneficiary. The subject matter of the trust in this class is usually personal property.** A *special* trust exists when the trustee by the express provisions of the instrument creating the trust is required to perform certain duties, or when the performance of such duties are incident to the powers conferred upon the trustee. These powers vary, but they are at least such as have been expressly conferred, or are necessarily incident thereto, and always include those required to enable the trustee to execute the trust.***

*An express private trust is defined to be one created for the benefit of individuals or families, and designed for private convenience and support. Perry, Trusts, Sec. 22.

**Boone v. Savings Bank, 84 N. Y. 83; Leighton v. Bowen, 75 Me. 504; Dean v. Long, 122 Ill. 447.

***Zabriskie v. R. R. Co., 33 N. J. Eq. 22; East Rome v. Cothran, 81 Ga. 359; 1 Spence Eq. Jur. 491; 2 Pom. Eq. Jur. Sec. 991.

Mr. Pomeroy divides pure trusts into four classes: 1. When the trust is simply to convey the property to some designated person or class of persons. 2. When the primary

Trusts may also be either *executed* or *executory*. When the instrument creating the trust so defines the intention of the testator or grantor, that the court has nothing to do except to take the limitations given, and convert the equitable into legal estates, the trust is said to be *executed*. While when the instrument does not by its terms constitute the trust, or effect the conveyance which it directs, but contains mere directions to convey upon certain trusts, it is said to be *executory*.*

In the case of executed trusts the court of equity will put the same construction on technical words as does a court of law. That is, if such words in a court of law, in a deed to A, would create an estate in tail in the grantee, they will also in a deed to A, for the use of B, for the use of C, create an equitable estate in tail in C.** But while in case of executory trusts the court will in certain cases follow this rule as to the construction of technical words, it is not bound by that construction in all cases. Neither is the rule arbitrary, so that where a technical construc-

object is to sell or dispose of the entire trust property in some manner and to use the proceeds for some ulterior purposes. 3. When the primary object is to hold and invest the entire property and its proceeds, and thus to accumulate for some ulterior purposes. 4. When the primary object is to hold the corpus of the property, receive its rents and profits and income, and apply them to some prescribed uses. *Id.* Sec 992.

**Eggeston v. Brownlow*, 4 H. L. Cas. 1; *Cushing v. Blake*, 30 N. J. Eq. 689.

***Williams*, Real Property, 160-1.

tion would defeat the evident intention of the grantor, as gathered from the whole instrument, such rule will be disregarded. If, however, there is nothing in the instrument to indicate that the real intention of the grantor will not be carried out by giving the words used their technical meaning, the legal construction of the instrument will be followed.*

Sec. 1163. EXPRESS PRIVATE TRUST—PARTIES.—The parties necessary to the creation of an express trust are: 1. The *settlor*, or person creating the trust. 2. The *trustee*, or the person in whom the legal title is vested. 3. The *cestui que trust*, or person entitled to the beneficial interest.

The Settlor. Any person competent to deal with the legal estate, may, if he desires, vest it in a trustee for the purpose of executing the settlor's intention. That is, all persons owing property in their own right may impress a trust upon such property.**

The Trustee. To be a trustee the party should be legally capable of taking and holding the legal estate, with legal ability and capacity to execute the trust, and domiciled within the jurisdiction of the court. A corporation may now be a trustee as to matters within the general scope of its corporate powers.***

*Trevor v. Trevor, 1 P. Wms. 622; Sweetapple v. Brindon, 2 Vern, 536.

**Lewin, Trusts, p. 30; Perry, Trusts, Secs. 32-35.

***Atty. Gen. v. Hospital, 2 De Gex, J. & S. 621; Vidal v. Girard, 2 How. 188; Winslow v. Cummings, 3 Cush. 358.

The *Cestui Que Trust*. As equity follows the law, any one capable of taking the legal estate may, through the channel of trusts, become the recipient of the equitable estate, but the designation of the person must be definite and certain. If the beneficiary of the trust is not definite and certain, it cannot be enforced. But it is held that the *cestui que trust* may be designated by description and need not be named.*

Sec. 1164. SAME SUBJECT — PROPERTY SUBJECT TO TRUST.—It is a general rule that all property, both real and personal, legal or equitable, may be made the subject of a trust. This includes choses in action, patent rights, growing crops, and the like.** But a trust as to foreign lands cannot be enforced, from the fact that the land is subject to the laws of the country where located.***

Sec. 1165. SAME SUBJECT—THE TRUST MAY BE VOLUNTARY, OR FOR VALUE.—The maxim that no action can be maintained on a *nudum pactum*, is recognized in equity as fully as at law.**** So that in equity an imperfect conveyance made for value is binding, while if such conveyance is voluntary it is not binding; but a voluntary conveyance when complete and perfect is binding, or, in other

*Levy v. Levy, 33 N. Y. 97; Holmes v. Mead, 52 N. Y. 332; Sale v. Moore, 1 Sim. 534.

**Row v. Dawson, 1 Ves. Sr. 332; Robinson v. Maudlin, 11 Ala. 977; Russell's patent, 2 De G. & J. 130.

***Lewin, Trusts, p. 49.

****Jefferys v. Jefferys, Cr. & P. 138.

words, a trust may be raised without any consideration for the transfer.*

Where the conveyance is voluntary the first question which presents itself to the court asked to enforce it is, has the trust been completely declared or constituted? If it has it is good, and will be enforced; if not, it is worthless, because the court will not aid a volunteer. But this question is not always an easy one to answer, and depends upon various considerations, which we briefly mention.

First. When the donor is the owner of both the legal and equitable interest in the subject matter of the trust, and has made an actual legal conveyance of the property in favor of a volunteer, or when he has declared himself a trustee for the donee, a binding trust is created.** But when the donor has made no declaration of trust, and his assignment or conveyance of the property is incomplete or imperfect, when it might have been made complete and perfect at law, the court will not aid in completing such conveyance or assignment.*** When, however, a complete and perfect conveyance or assignment could not be made at law, and the donor has done all he could do, it will be held good; but if the donor has omitted to do

*Jones v. Lock, L. R. 1 Ch. 25.

**Ex parte Pye, 18 Ves. 140.

***Antrobus v. Smith, 12 Ves. 39; Searle v. Law, 15 Sim. 95.

something which he might have done, it will be held bad.*

Second. When the donor is the equitable owner of property, and he directs trustees to hold the property in trust for the donee, the trust is well created.**

If the property is pure personal property, the trust may be created by parol, but if the property is an interest in land, either freehold or a chattel real, the direction must be given in writing to satisfy the provisions of the statute of frauds.***

A voluntary trust may be good as between the parties, and void as to third persons or creditors; that is, where the voluntary conveyance operates to hinder, delay or defraud creditors.****

**Fortescue v. Barnett*, 2 My. & K. 36; *Edwards v. Jones*, 1 My. & Cr. 226; *Pearson v. Ins. Office*, 27 Beav. 229; *Otis v. Beckwith*, 49 Ill. 121.

***Bill v. Canton*, 2 My. & K. 503.

****McFadden v. Jenkins*, 1 Ph. 153; *Kronheim v. Johnson*, 7 Ch. Div. 60; *Penford v. Mould*, L. R. 4 Eq. 562.

****A statute passed in the time of Elizabeth declared all conveyances, gifts and alienations of lands and goods, whereby creditors might in anywise be disturbed, hindered, delayed or defrauded of their just rights, utterly void. Similar statutes are in force in all the states. *Halloway v. Millard*, 1 Mod. 225; *Ex parte Elliott*, L. R. 2 Ch. Div. 104.

There may be a voluntary conveyance made by a person in debt and be good. Thus if it can be shown that the grantor was perfectly solvent after making the assignment, the fact that he was in debt is immaterial. The question as to what amount of indebtedness will raise the presumption of fraud is always a question of fact to be determined in each case. As a general rule it may be said that if the donor was in embarrassed circumstances at the time he made the

It is a general rule in this country that a general assignment in favor of creditors, creates a trust in favor of such creditors and is irrevocable, and that such a trust may be enforced without the creditors doing any act indicating their acceptance.* In England, it seems that such a transfer is not an irrevocable trust until the creditors have been informed of the assignment and accepted it by forbearing to press their claims.**

In many of the states, debtors instead of giving mortgages to their creditors, give a deed of trust to a third person, conditioned that if the grantor does not pay the debt mentioned within a specified time, the grantee shall sell the land and out of the proceeds pay such debt, and pay over to the grantor any surplus that may remain.*** In many states this form of security has come into general use. Such deeds do not differ materially from mortgages containing a power of sale, and they are usually considered and treated as mortgages.**** Therefore in those states

gift, or that he became embarrassed immediately after and by reason of the assignment, it is void as to creditors. *Spirett v. Willows*, 1 Mod. 225; *Freeman v. Pope*, L. R. 5 Ch. 538; *Story*, Eq. Jur. Secs. 362-5.

**Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Fuller v. Hasbrouck*, 47 Mich. 78; *Preston v. Spaulding*, 120 Ill. 209; *Pom. Eq. Jur. Sec. 3994*.

***Walwy v. Coutts*, 3 Sim. 14; *Acton v. Woodgate*, 2 My. & K. 492; *Watson v. Knight*, 19 Beav. 369; *Johns v. James*, 8 Ch. Div. 744.

****Taylor v. Stevens*, 18 Gratt. 244.

*****Webb v. Houlton*, 4 Neb. 308; *Austin v. Sprague Mfg. Co.*, 14 R. I. 464; *Partridge v. Shepard*, 71 Cal. 470.

where the mortgagee holds the legal title, the legal title passes to the trustee, and in those states which treat a mortgage as a mere security the trustee is considered to hold a lien simply.* The trustee on account of the special trust reposed in him cannot assign the trust unless the power is given in the deed, otherwise with a mortgage.** So when the trustee has once accepted the trust he cannot renounce it without the consent of the beneficiary or the court, and the court can compel him to discharge the trust.***

The trustee must use reasonable diligence to protect the interests of the grantor, and is liable for all damages arising from his neglect in that regard. His duties are not merely formal. He must inform himself as to the condition of the property, and pursue that course in its sale which will secure the best price.**** A distinction is to be noted between a trust deed to secure the payment of a particular debt or particular debts, and a deed of trust conveying property unconditionally, with power to sell and raise funds to pay off the grantor's debts generally; the former is a mere security for the debt or debts, the

*Newman v. Samuels, 17 Ia. 528; Railroad v. Auditor Gen., 41 Mich. 635; Bank v. Lonahan, 45 Md. 396.

**Pickett v. Jones, 63 Mo. 193; Irish v. Antioch College, 126 Ill. 638.

***Sayent v. Howe, 21 Ill. 48; Commond v. Railroad, 122 Pa. St. 306.

****Cassidy v. Cook, 97 Ill. 385; Landum v. Union Bank, 63 Mo. 48; Mullu's Admr. v. Stone, 84 Va. 834.

latter is an absolute deed of trust not subject to a condition of defeasance.*

Sec. 1166. HOW EXPRESS TRUSTS ARE CREATED.—No particular form of words need be used in creating a trust. If it appears that the donor intended to create a trust that is sufficient. It being stated as a general rule, that when property is given absolutely to any person, and such person is requested, or entreated, or recommended to dispose of such property in favor of another, such request, entreaty or recommendation will create a trust,—provided: First. That the words are so used that they can be fairly construed as imperative.** Second. That the subject matter of the request be definite and certain.*** Third. That the designation of the *cestui que trust* be also certain and definite.****

*Hoffman v. Mackall, 5 Ohio St. 124; McDonald v. Kellogg, 30 Kan. 170. Contra, Bank v. Chapelle, 40 Mich. 447.

**The words of request as used must fairly import a command. They must show that the donor had in his mind an intent and purpose that his gift should be for the benefit of a particular object or person. The manner in which he has expressed that intent and purpose is unimportant. Such words and phrases as, "wish and request" (Leddard v. Leddard, 28 Beav. 266), "have fullest confidence" (Shovelton v. Shovelton, 32 Beav. 143), "well know" ((Bardswell v. Bardswell, 9 Sim. 319), have been held sufficient to create a trust.

***The subject matter of the request must be definite and certain. If there is an absolute gift of property to one person, and the request be that an uncertain part of it be given to another, as, what shall be left, or what he shall die possessed of, such request will be ineffectual to create a trust for uncertainty. Pope v. Pope, 10 Sim. 1; Ruggins v. Yates, 9 Mod. 122; Curtis v. Rippley, 5 Mod. 434.

****If it does not appear certainly what person is to be

If the language used does not import a command, that is, a clear intent on the part of the donor that the property shall be held for the use of some particular person or object, but leaves it optional with the donee, or discretionary on his part, to apply the property as requested or suggested, no trust will be created.* If the trust fails for uncertainty, the trustee does not reap the benefit, as it is clear that he was not to have the beneficial use of the property, and the court will consider him as trustee for the use of the person or persons to whom the property would have descended if there had been no effort to create a trust.**

Sometimes a power is given to a person which partakes of the nature of a trust; the court considers such powers as *quasi* trusts, and if the person who has the power does not discharge the duty which the power imposes, the court will perform it in his place.***

By a section of the Statute of Frauds (29 Car. II.), it was enacted, that all declarations or creations of trusts, or confidence in any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law able to declare the trust, or by his last will in writing, or else

benefitted, or what object the settlor had in mind, the trust fails for uncertainty as to the object of the trust. *Sales v. Morse*, 1 Sim. 534.

**Howorth v. Dewell*, 29 Beav. 18; *Benson v. Whittam*, 5 Sim. 22.

***Briggs v. Penny*, 3 Mac. & G. 546; *Sidgreaves v. Brewer*, 15 Ch. Div. 594.

****Tweedale v. Tweedale*, 7 Ch. Div. 633; *Burroughs v. Philcox*, 5 My. & Cr. 72.

they shall be utterly void. This statute has been adopted substantially in all of the states, although the wording of the statutes vary in the several states.* The trust itself need not be declared in the writing conveying lands; it may be manifested and proved by some writing, duly signed, which may have been executed at the time the conveyance was made, or subsequently, and it may be quite informal.** And this written evidence may be a writing signed by the grantor or the trustee. The grantor may also declare himself the trustee, that is, that he holds certain lands in trust for a particular purpose.***

But the statute of frauds does not apply to trusts the subject matter of which is pure personality; such trusts may be created by parol, providing the language creating them is clear, explicit and free from all ambiguity.****

The provisions of the statute of frauds apply to chattels real, but not to a money indebtedness secured by a mortgage upon real estate.*****

To summarize, if the trust is in lands, it must be manifested and proved by a writing. While no particular form of words is necessary, yet it must show

*Perry, Trusts, Sec. 78n; *Clark v. Haney*, 62 Tex. 511.

**Forster v. Hale, 3 Ves. 696; *Ambrose v. Ambrose*, 1 P. Wms. 322; *Gordon v. McCulloh*, 66 Md. 245.

****Miles v. Thorne*, 38 Cal. 335; 11 Busk 120; 109 Mass. 581; 24 N. J. Eq. 431.

*****Davis v. Coburn*, 128 Mass. 377; 70 Ind. 135; 52 Md. 255; 11 R. I. 266; 49 Mich. 14; 62 Mich. 598.

******Sapia v. Demartini*, 77 Cal. 383; 11 Am. St. Rep. 288.

clearly an intent to create a trust; must sufficiently designate the subject matter of the trust; definitely and explicitly designate the beneficiaries, and the interest each is to have; and designate the manner in which the trust is to be executed. If the language used fails to express either of these essentials, the trust thereby fails.*

The intention to create a trust may appear inferentially from the express purpose and object of the conveyance, which purpose and object are clearly expressed. So the intent to create an express trust may appear from the powers given the trustee.** The intention may also be inferred when property is conveyed, or willed, and the object of making the conveyance is expressed.***

Sec. 1167. EXPRESS PUBLIC OR CHARITABLE TRUST.—Where the trust is a public one, no particular person or persons are designated, but the trust is always for the benefit of unnamed persons, a part of the general public, as, for example, the “poor” of a particular district. In order that the trust may be regarded as public, it must be created for such an uncertain and indefinite class of persons. The beneficiaries are uncertain, since no particular persons are named, and indefinite, for the reason that the persons

**Smith v. Ford*, 48 Wis. 115; *Society v. Bowen*, 21 Hun, 389; 87 Pa. St. 263; 31 Ark. 580; 54 Cal. 6; 63 Ga. 711.

***Tobias v. Ketchum*, 32 N. Y. 319.

****Taft v. Taft*, 130 Mass. 461; 35 N. Y. 83; 65 N. Y. 389; 80 Pa. St. 258.

forming the class are continually changing. The class, however, must be clearly designated, and the purpose and object of the trust indicated.*

The object of the trust must be in its essential features one for the benefit of the public. A mere private object does not come within the definition of a public charity. Consequently, while property may be given in perpetuity for a public charity, if the object is essentially private, such gift would be void, falling within the statute against perpetuities. A trust created for the purpose of keeping a private tomb, or monument in repair, has been held to be a private and not a public trust.**

The purposes which will constitute a public trust are enumerated in the statute of charitable uses (43 Eliz. c. 4) as follows,—“The relief of aged, impoverished and poor people; the maintenance of maimed and sick soldiers and marines; the support of schools of learning, free schools and scholars of universities; repairs of bridges, ports and havens, causeways, sea-banks,

**Morice v. Bishop of Dunham*, 9 Ves. 399.

“A charity is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion; by relieving their bodies from disease, suffering or restraint; by assisting them to establish themselves in life; or by erecting and maintaining public works; or otherwise lessening the burden of the government.” Per Curiam, in *Jackson v. Phillips*, 14 Allen, 539.

**In *re Rickard*, 31 Beav. 244; *Piper v. Moulton*, 72 Me. 155; *Bates v. Bates*, 134 Mass. 110; 79 Ala. 423; 28 Mich. 153; 73 Pa. St. 362; 142 Mass. 216.

churches and highways; the relief, stock and maintenance of houses of correction; marriage of poor maids, aid and help of young tradesmen, handicraftsmen, and persons decayed, relief and redemption of prisoners and captives; aid of poor inhabitants concerning payment of fifteenths, setting out of soldiers and other taxes." All the objects mentioned are included in the term public charity, and there are several not mentioned which are also included. These are:—

1. Religious Purposes. The report and spread of religion is regarded as a public charity, and consequently a trust for the purpose of furthering such objects will be sustained. This subject is very correctly restrained in England as to hold void such trusts as would aid "superstitious purposes.* While in America the greatest latitude and freedom of belief and practice is permitted and sanctioned, with the result that trusts to very foolish uses would be sustained.**

2. Benevolent Purposes. A trust for any benevolent purpose which will aid or assist any class of the general public is upheld as within the spirit of the

*In *re Blundell*, 30 Beav. 360; *Atty. Gen. v. Fishmongers' Co.*, 5 My. & C. 11.

***Holland v. Allcock*, 108 N. Y. 312; 72 Me. 496; 26 Am. Dec. 61. A trust to aid in the overthrow of all other religions or beliefs will not be sustained, the donor can only aid in the propagation of his own particular belief. *Zeiswiess v. James*, 63 Pa. St. 435.

act.* The class to be relieved and the mode of aiding them must be essentially public.**

3. Educational Purposes. A trust for the establishment and maintenance of public schools, or the education of a particular class of persons will be upheld.***

4. Public Purposes. The statute enumerates certain public works, highways, bridges, etc., it follows that any trusts having for their object public works, or the maintenance of any service in which the public is interested, falls within the statute.****

Sec. 1168. SAME SUBJECT—HOW CREATED AND CONSTRUED.—Public trusts or charities are highly favored in the law, and charitable gifts are sometimes held good, when if they had been made to a private person they would have failed. For instance, if a testator has clearly expressed an intention to create a trust in favor of some private person but has not definitely indicated the person, it fails; while the same gift to a charitable purpose, leaving uncertain the mode by which it was to be carried into effect, would be upheld, the court supplying what was defective in the trust. But in such a case the trust must be purely and wholly charitable, not partly char-

**Sohier v. Burr*, 127 Mass. 221; 29 N. J. Eq. 32; 95 U. S. 303; 121 Ill. 269.

***Bangor v. Masonic Lodge*, 73 Me. 428; 73 Pa. St. 362.

****Russell v. Allen*, 5 Dillon, 235; 125 Mass. 321; 28 Mich. 153; *Carne v. Long*, 2 De G. F. & J. 75.

*****Atty. Gen. v. Webster*, L. R. 20 Eq. 483; 88 Pa. St. 389.

itable and partly private, for example, for charitable and general purposes at discretion.*

Sec. 1169. SAME SUBJECT.—THE DOCTRINE OF *cy-pres*.—When the literal execution of a charitable trust becomes impracticable or inexpedient, the court will execute it—*cy-pres*—that is, as nearly as possible to the original purpose, so as to execute it in substance. The court assumes in such cases that the real intent of the donor or settlor was to give a certain sum to the charitable purposes named, and that he merely indicated one particular mode of accomplishing his purpose, and if that mode proves impracticable, it is the duty of the court to substitute another mode that the true purpose and intent may not fail.** But if there is no intent apparent to give to some general charitable objects, and an intent to give solely and exclusively to some particular object, the doctrine of *cy-pres* is not applicable. In such cases the trust fails and goes to the heirs.***

We have seen that equity will not aid a private volunteer where the trust is defective, but a charity will be aided under like circumstances.****

*Pocock v. Atty. Gen. L. R. 3 Ch. Div. 342; 9 Ves. 399; L. R. 12 Eq. 574; 4 Wheat. 1.

**Moggridge v. Thackwell, 7 Ves. 36; Atty. Gen. v. Iron-Mongers' Co., 2 Beav. 313.

***Loscombe v. Wintringham, 13 Beav. 87.

****Sayer v. Sayer, 7 Hare, 377; Innes v. Sayer, 3 Mac. & G. 606.

Sec. 1170. IMPLIED OR RESULTING TRUSTS TO CHARITIES.—The following rules as to resulting trusts in gifts to charities are given by Levin, in his work on Trusts (pp. 130-1).

1. When a person expressing an intention to aid charitable purposes generally, makes a valid gift, but does not particularize any objects, or those particularized do not exhaust the gift, the court will not suffer the gift in the first instance, or the surplus in the second, to revert to the donor or his representatives, but will execute the trust by declaring the purposes to which the fund or the surplus shall be applied.* 2. When a person settles land, or the rents and profits of land to certain purposes, and afterwards there is, after supplying such purposes, owing to an increase in the revenue of the lands or the diminished expense, a surplus, the court will direct such surplus to be expended in a similar manner with the original amount.** If, however, the donor does not give the land or all the rents, but appropriates a part only to charity, the surplus or residue in that case will belong to the donor or his representatives.*** So a court of equity will not allow a trust to fail, whether it be in favor of an individual or a charity, for want of a trustee. Thus when property is given by will

*Atty. Gen. v. Herrick, Amb. 712; Atty. Gen. v. Tonna, 2 Ves. Jr. 1.

**6 H. L. Cas. 310; Atty. Gen. v. Marchant, L. R. 3 Eq. 424.

***5 H. L. Cas. 1; 24 Beav. 383.

to such a person as the testator shall name, in trust for an individual or a charity, and no such person is named; or, when property is given to such person as the executor shall name in trust, etc., and the executor names no one, the court of chancery will carry the trust into effect, since while the trustee is uncertain, the beneficiary is certain.*

Sec. 1171. IMPLIED TRUSTS OR RESULTING TRUSTS.—An implied trust is founded upon the intention which the court presumes the settlor had when he created the trust. Implied trusts are often called resulting trusts. When a man purchases property, furnishing the purchase money, taking the title in the name of a stranger, there will be a resulting trust in favor of such purchaser. And when two or more persons advance the purchase money jointly, and the title is conveyed to one only, there is a resulting trust in favor of the others, in proportion to the money which each has advanced.** The money must be paid at the time of the conveyance. If at the time of the conveyance a trust is not created, subsequent payments or advancement of money will not change an absolute conveyance into one in trust for the benefit of the party so paying.***

The party seeking to raise such a trust must show:

1. That there was an intention to create a trust. 2.

*7 Ves. 36; 3 My. & K. 344.

***Waterman v. Seeley*, 28 Mich. 77; 26 Ind. 319; 55 Ill. 403.

****Gerry v. Stewson*, 60 Me. 186; *Cutler v. Tuttle*, 19 N. J. Eq. 549.

That there has been an actual payment of the consideration by such person of his individual money. And clear proof is required to establish both of these propositions.*

A voluntary conveyance of land does not create a trust in favor of the grantee.** Nor will a trust be created when it appears that it was the purpose and intent of the parties to circumvent a statute.*** So if title is taken in the name of another for the purpose of defrauding creditors, the better rule seems to be that there is no resulting trust in favor of the purchaser, except upon the application of a creditor.****

Since the resulting trust is based upon the presumed intention of the party actually making the purchase, if it can be shown, that in fact he had no intention to create a trust for himself, but on the contrary intend-

*Bernard v. Bongard, Har. Ch. 130; 2 Johns Ch. 405; 2 Wend. 570. As between strangers, proof of payment shown by parol will usually raise a presumption in favor of the intention to create a trust, but such presumption may be rebutted by parol. No such presumption is raised if the payment is made by one who stands *in loco parentis* to the grantee. In such a case the natural and legal presumption is, that the money paid, is a donation or advancement to the grantee, and not for the benefit of the one making it. Sand. on Uses and Trusts; 325; 8 Ves. 195; Lofft. 490; 1 Collyer, 261.

**Jackson v. Cleveland, 15 Mich. 94; Gerry v. Stimson, 60 Me. 186; Campbell v. Brown, 129 Mass. 23; Higgins v. Senior, 8 M. & W. 834.

***Miller v. Davis, 50 Mo. 572; 5 Paige, 114; 15 Ves. 60.

****Cutler v. Tuttle, 19 N. J. Eq. 549; 23 N. J. Eq. 60; 50 N. H. 491; 98 Mass. 118.

ed to make a donation to the party in whose name the title was taken, there will be no resulting trust.* And, as before stated, if the purchaser is under any legal or moral obligation to aid, assist or provide for the person in whose name the purchase was made, the fact of such obligation is, of itself, sufficient to overcome the legal presumption upon which an implied trust rests, and raise the presumption that an advancement was intended. This presumption of advancement will be raised in favor of:—a legitimate child,** any person to whom the person advancing the money has placed himself in the relation of a parent;*** and in favor of a wife.****

The presumption of advancement will not arise in favor of a woman with whom the man has contracted an illegal marriage, or with whom he has contracted no marriage at all.***** And the presumption of advancement being a mere presumption, may be rebutted by evidence showing what was in fact the true and real intention of the purchaser at the time the purchase or payment was made.*****

*Ayer v. Jenkins, L. R. 16 Eq. 275; Amb. 413.

**Sidmouth v. Sidmouth, 2 Beav. 447; 69 Pa. St. 239.

***Beckford v. Beckford, Lofft. 490; 2 Ch. Cas. 26; 1 Coll. C. Ch. 261.

****Drew v. Martin, 2 H. & M. 130; L. R. 6 Ch. Div. 115; 16 Minn. 512.

*****Soar v. Foster, 4 K. & J. 152; 10 Ves. 360.

*****Williams v. Williams, 32 Beav. 370; L. R. 8 Ch. App. 88; 1 P. Wms. 113; 39 Ia. 419.

Sec. 1172. SAME SUBJECT—RESIDUE OF TRUST PROPERTY.—When property is conveyed to trusts which do not exhaust the whole property, there will be a resulting trust as to the residue to the settlor. And when property is so devised by will, the residue will go to the party to whom it would have descended had there been no will.* It being a general rule with regard to resulting trusts, that the trustee cannot take beneficially in case there is a failure of the trust, and this is so whether the failure is in whole or in part.** When there is a devise, burdened with a charge, the devisee takes the property beneficially, subject merely to the charge. But when the devise is wholly in trust, the devisee takes no interest whatever.***

Sec. 1173. SAME SUBJECT—DISPOSITION OF TRUST ESTATE ON FAILURE OF HEIRS, ETC.—Where property is conveyed in trust, and the trust designated does not exhaust the property, and the settlor dies leaving no will, and no one entitled to take under the statute of descent, the question arises as to whom the residue belongs, the state or the trustee.**** If it is real estate it belongs to the trustee. While if it is personal property and the executor holds as trustee, it goes to the state.*****

*Esterbrooks v. Tillenghast, 5 Gray, 17.

**King v. Dennison, 1 V. & B. 272.

***State v. Uhrig, 56 Mo. 482.

****Sputing v. Rochefort, 16 Ch. Div. 18; Burgess v. Wheate, 1 Eden, 177.

*****Tayler v. Haygarth, 14 Sim. 8; 15 Ch. Div. 67. While

Joint tenancy is not favored in equity, and although in this class of cases it follows the law if there is a case of joint tenancy pure and simple; when there is anything which the court of equity can lay hold of to take the estate out of joint tenancy, it will do so, and will regard the survivor as holding in trust, and not in ownership, the deceased tenant's share. This will be done if the purchasers advance unequal shares of the purchase money.* There is no survivorship in commercial transactions; in such transactions the joint purchasers are regarded as partners, and in case of death of one partner, the survivor or survivors hold in trust for the personal representatives of the deceased.**

if the executor holds as executor simply, and not as trustee, he may retain the residue. *Blinkham v. Feast*, 2 Ves. Sr. 26. The reason for the rule is that the state comes under no branch or head of equity, and if real estate is given by will to a trustee in trust for a particular person, who dies before the testator, the state cannot enforce the resulting trust in favor of itself. If it is personal property the interposition of a court of equity is unnecessary, as the property goes to the state upon failure of heirs. 14 Sim. 8. While if the legatee survives the testator and dies without heirs, the estate escheats to the state. 14 Sim. 8; 1 Bro. C. C. 201.

**Rigden v. Vallier*, 2 Ves. Sr. 258; 3 Ves. 631; 44 Vt. 311; 9 Ves. 591.

***Jeffreys v. Small*, 1 Vern. 217; *Bell v. Phryn*, 7 Ves. 453. If the land is not purchased by a partnership, but is devised to two or more persons who have formed a partnership, but who make no use of it for partnership purposes, they will hold as joint tenants, and in case of death it will go to the survivor or survivors. Otherwise if they have used it for partnership purposes, or classed it as part of the firm assets, *Jackson v. Jackson*, 9 Ves. 491.

Parties owning a mortgage jointly are always regarded in equity as tenants in common, and not as joint tenants, and the survivor will be trustee of the interest of the deceased mortgagee, in trust for his heirs or legatees.*

These doctrines of equity were established long before there was any statute upon the subject. But it has happened in this class of cases, as in many others, that the equitable rule has commended itself to the legislature, and has been made the statutory rule. So that statutes in the various states provide now that where a conveyance is made to two or more persons jointly, they are held to be tenants in common, unless it is made to appear from the instrument that they intended to hold as joint tenants.

Sec. 1174. CONSTRUCTIVE TRUSTS.—A constructive trust is one that is raised by construction of equity, without reference to any intention of the parties, either express or presumed. The following are instances of constructive trusts.

1. Vendors Lien for Unpaid Purchase Money. Where there has been a simple sale of property for money, and the purchase price has not been paid, or only paid in part, the vendor has a lien for the whole of the unpaid portion of the purchase money, as between the vendor and vendee and volunteers, although the property has been conveyed unconditionally, and he has acknowledged payment in full in the instrument

*Randall v. Phillips, 3 Mason, 378; Goodwin v. Richardson, 11 Mass. 469; 19 Me. 430.

passing title.* This is the well established English doctrine, but it does not prevail universally in this country. In some of the states it has been repudiated by the courts, in others the rule has been modified or altogether abrogated by statute.** When collateral security is taken, such as a bond or a promissory note, there is no waiver of the lien, and the security is regarded as cumulative.*** But if such bond or note was substituted for the purchase money, or was what the vendor bargained for, and what the vendee agreed to give, there is no lien, or Constructive trust.****

In such cases, when the vendor has a lien for unpaid purchase money, it binds the estate conveyed not only in the hands of the vendee, but also in the hands of: (a) Heirs and all persons taking under the vendee or his heirs as volunteers.***** (b) Subsequent purchasers with notice of the purchase money remaining unpaid.***** (c) In case of the insolvency of the vendee, the lien binds the estate in the hands of

*Mackreth v. Symons, 15 Ves. 329; 1 Tudor & W. L. Cas. Eq. 355; 60 Ala. 281.

**Pomeroy, Eq. Jur. Sec. 1250.

***Collins v. Collins, 31 Beav. 346; 12 R. I. 92.

****Buckland v. Pocknell, 13 Sim. 406; 21 Beav. 118.

*****15 Ves. 329; Warton v. Hargroves, 42 Miss. 18.

*****2 Ves. Sr. 622; 29 Beav. 246. And when the subsequent purchaser purchases without notice, and does not pay the full purchase price, the lien binds the estate to the extent of the unpaid purchase money still in the hands of the purchaser. That is, equity will subrogate the first vendor to the rights of his vendee against the second vendee.

the assignee, for the reason that he takes no greater interest than the insolvent or bankrupt.*

On the other hand, a *bona fide* purchaser without notice, and for value, having paid the full purchase price, takes the estate relieved of the lien, since, "when the equities are equal the law shall prevail." (1 Bro. C. C. 302; 2 Bro. C. C. 282.)

In England this lien is regarded as an interest in land which the holder can assign; and not a mere personal claim. But in this country there is a great conflict of authority upon this question.** The grantor's lien for a part of the purchase money may be reserved by an express provision in the deed of conveyance. And this is the practice in some of the states. This lien being evidenced by the deed itself, operates to make all subsequent purchasers and incumbrances take subject to it.***

When a vendor contracts to convey land, or gives a bond conditioned that he will convey, and lets the purchaser into possession before the purchase money is paid in full, the purchaser takes the land subject to the agreement to pay. In default of his paying the vendor can enforce the contract in equity, and have the land sold to satisfy the unpaid purchase money.

*Ex parte Hanson, 12 Ves. 346.

**Dryden v. Frost, 3 My. & C. 670; 2 Phill. Ch. 413; 71 Mo. 387; 128 Ill. 178; 11 Ind. 504.

***Cordova v. Hood, 17 Wall. 1; 104 Pa. St. 64.

But this is not strictly a vendor's lien, since the vendor retains the legal title.*

The vendee, under the contract for the purchase of land, in case the vendor defaults or is unable to perform, has a lien for the purchase money paid, and for the value of improvements made upon the land, and this lien is analogous to a true vendor's lien.**

Sec. 1175. SAME SUBJECT—2. CONSTRUCTIVE TRUST ARISING FROM A RENEWAL OF A LEASE BY A TRUSTEE, TENANT FOR LIFE OR PARTNER.—When a trustee renews a lease belonging to his *cestui que trust* in his own name, he holds such lease for his *cestui que trust*; and when a partner renews a lease of partnership premises in his own name, he holds as trustee for the partnership. And a like rule applies to all persons occupying a fiduciary, or *quasi* fiduciary position and making contracts with reference to such property.***

Sec. 1176. SAME SUBJECT—3. CONSTRUCTIVE TRUST ARISING FROM BENEFITS BESTOWED ON PROPERTY.—A constructive trust may arise when a person who is only part owner of an estate, and acting *bona fide* benefits such estate by repairs and improvements, by giving him a lien therefore.**** But ordinarily where one by mistake ex-

*Avery v. Clark, 87 Cal. 619; Rose v. Watson, 10 H. L. Cas. 672.

**Stults v. Brown, 112 Ind. 370; 10 H. L. Cas. 672.

***James v. Dean, 11 Ves. 383; 15 Ves. 236; L. R. 2 H. L. 149.

****Lake v. Cradock, 3 P. Wms. 158.

pend money to improve the property of another without the owner's knowledge or consent, he has no equitable claim against the owner. But if the owner is compelled to resort to equity to get possession of his property, the court will require him to do equity before giving relief, by compelling payment for the permanent improvements made.*

Sec. 1177. SAME SUBJECT—4. FOR MONEY HAD AND RECEIVED.—Money received by one person from another by mistake, accident or fraud, or breach of trust, is regarded in equity as being held in trust for the true owner. In many such cases an action at law in *assumpsit* may be maintained, but in all cases where a judgment does not afford complete and adequate relief, a bill in equity can be maintained.** So if property is wrongfully disposed of, the person obtaining it with notice will be treated as a trustee, and can only be protected if he purchase in good faith, without notice and for value.*** So where trust money is paid on account and the receiving creditor has no notice of their character, they will be discharged of the trust.****

Sec. 1178. SAME SUBJECT—5. PROPERTY PURCHASED WITH TRUST FUNDS.—Whenever a person holding property in trust, invests such

**Neeson v. Clarkson*, 4 Hare, 97; 4 My. & Cr. 180; 30 Beav. 363; L. R. 2 Ch. Div. 285.

***Newton v. Porter*, 69 N. Y. 133; 120 Mass. 507

****Leake v. Watson*, 58 Conn. 332.

*****Burnett v. Gustafson*, 54 Ia. 86; 56 N. Y. 478; 79 N. Y. 183.

funds, rightfully or wrongfully, and takes title in his own name, the property acquired is trust property, and the party is still trustee. This rule applies to all fiduciary relations, as executors, guardians, partners, treasurers, etc.*

So when property is purchased by the executor or guardian which he is empowered to sell in pursuance of his trust, such property is still trust property if the beneficiary elects to treat it so, so all profit from the use of trust funds goes to the beneficiary.**

Sec. 1179. SAME SUBJECT—6. TRUSTS EX DELICTO.—When one obtains the property of another by fraud, misrepresentation, concealment or duress, or undue influence and the like, the courts will regard him as a trustee. Thus, a legatee that procures a bequest to himself to the injury of an heir or other legatee, will be a trustee for the person rightfully entitled.*** And where property is given upon a verbal promise that it will be held in trust, and the agreement is not carried out, equity will enforce the trust.****

In all cases of trusts arising *ex delicto*, the beneficiary is considered to be the true owner of the prop-

*Moritz v. Lavelle, 77 Cal. 10; 100 Mo. 446; 73 N. Y. 113.

**Gardner v. Ogden, 22 N. Y. 327; 35 Kan. 106; 122 Ill. 607.

***Moore v. Crawford, 130 U. S. 122; 93 Ill. 295; 14 Kan. 202; 50 Mich. 190; 107 N. Y. 73; 29 N. J. Eq. 417; 104 Pa. St. 609; 95 N. Y. 403; 3 Wall. 279.

****Ryan v. Dox, 34 N. Y. 307; 26 N. J. Eq. 484; 4 N. J. Eq. 410.

erty, and the trustee as the holder of the bare legal title. The beneficiary, therefore, can compel the trustee to convey the property and account for the rents and profits which he has received, or, which he ought to have obtained while the property has been in the hands and control of the trustee.*

*Barnes v. Taylor, 30 N. J. Eq. 7; Greenwood's Appeal, 92 Pa. St. 181.

CHAPTER V.

PROPERTY IN EQUITY—MORTGAGES, LIENS AND ASSIGNMENTS.

Sec. 1180. REAL ESTATE MORTGAGES.—In equity a real estate mortgage is regarded as a lien or claim on land to secure the payment of a debt.* This construction was early placed upon mortgages by the equity courts to modify the rigor of the early common law, which held that on default the estate of the mortgagee became absolute and indefeasible, the property passing to him, regardless of the fact that it might be far more valuable than the claim or debt. Chancery during the reign of Charles I., established the rule that the mortgagor could redeem after default, by paying principal and interest, until the mortgagee had obtained from the chancery a decree of absolute foreclosure. The right to redeem was known as the “equity of redemption”.**

Resulting from the principle that equity regards substance rather than form, the chancery courts will

*Seton v. Slade, 7 Ves. 265; 1 Spence, p. 602.

**How. v. Vigneres, 1 Ch. R. 32; Casborne v. Scarfe, 1 Atk. 603; 2 White & Tudor, L. C. Eq. 1945. An attempt to have the mortgagor renounce or waive his equity of redemption after default, was met by the equity courts laying down the rule, that “once a mortgage always a mortgage”, and upholding the equity of redemption notwithstanding the waiver. Howard v. Harris, 1 Vern. 90; White & T. L. C. Eq. 1949.

regard as a mortgage, a formal deed, if it was executed to secure the repayment of a loan or debt. And the real intention of the parties as to such a deed may be shown by parol, notwithstanding the rules of evidence and the statute of frauds.*

So a sale of land, with an option reserved to the vendor to repurchase the same land within a specified time, will be regarded in equity as a mortgage, where the conveyance was intended by the parties to operate as security for a debt.**

The debt being the principal thing regarded by the court of equity it follows naturally that the security would go with the debt when the latter is assigned or transferred, so that a transfer of the note which the mortgage secures transfers the mortgage. Except that in those states where the mortgagee is vested with the legal title by virtue of the mortgage, a formal deed is necessary to vest the legal title in the assignee.*** And when mortgaged premises are conveyed subject to the mortgage, the land continues to be charged with the payment of the debt, but the grantee is not personally liable for the debt unless he assumes the mortgage.****

*Helm v. Boyd, 124 Ill. 370; Turpie v. Lowe, 114 Ind. 37; 111 Pa. St. 14; 96 U. S. 332; 120 N. Y. 655; Beach, Eq. Jur. Sec. 406; 109 Mass. 130; 54 Miss. 90; 32 Ala. 97

**Schriber v. LeClaire, 66 Wis. 579; 122 N. Y. 467; 4 Kent. Com. p. 145.

***Carpenter v. Longan, 16 Wall, 271; Sanders v. Cassaday, 86 Ala. 246; 11 Ia. 580; 95 Ind. 521; 127 Mass. 511.

****Johnson v. Zink, 51 N. Y. 333; 41 Conn. 369; 121 Ill. 130; 108 U. S. 140; 4 N. J. Eq. 454; 22 N. Y. 438.

In England, by foreclosure of a mortgage is meant a proceeding in chancery, at the instance of the mortgagee, by which the mortgagor's right of redeeming the mortgaged premises is barred forever. This method of foreclosure prevails in some of the American states and is known as "strict foreclosure".* While in most of our states a foreclosure proceeding has for its object a sale of the mortgaged lands, and the application of the proceeds to the payment of the debt and costs, and a personal judgment against the mortgagor for any deficiency after such application.**

Before a final foreclosure and in some states for a definite time thereafter, the mortgagor or any person having an interest in the property covered by the mortgage may redeem by paying same in toto. The person so redeeming the whole mortgage, if only liable for a portion thereof, may enforce contribution from other persons liable.***

Sec. 1181. CHATTEL MORTGAGES.—By a chattel mortgage is meant a sale of personalty on condition that it shall be avoidable on the performance of the specified condition—usually the payment of a debt within a stated time. At law, on default, the title

*2 Jones, Mortgages, Sec. 1238. Strict foreclosure is still employed in England and several of the New England States, and some others.

**Foreclosure by judicial sale is followed in most of the states. 2 Jones, Mortg. 1709; 112 N. Y. 93; 134 Ill. 422; 49 Wis. 200.

***2 Jones, Mortg. Sec. 1093; Pearce v. Morris, 5 Ch. App. 229; 42 Minn. 476; 128 Ill. 95; 62 Ia. 661; 127 N. Y. 117.

vests absolutely in the mortgagee, while equity allows the mortgagor to redeem after default. In all of the states except California and a few of the western states, a chattel mortgage, unlike the rule in most states as to real estate mortgages, vests the title in the mortgagee, which title becomes absolute on default of the condition, subject to an equitable right of redemption prior to public or private sale of the article without foreclosure suit, except where foreclosure is made necessary by special statutes, as in Ohio, in regard to mortgages of household chattels.*

Sec. 1182. **EQUITABLE LIENS AND MORTGAGES.**—An equitable lien is the right to subject a particular fund or specific property to the satisfaction of a demand. It is a charge on the property, rather than an interest in it. It differs from a common law lien, in that it is independent of the possession or retention of the property on which the lien exists.**

An equitable mortgage is a charge or lien on property, and may be created by:—an agreement to give a mortgage; the imperfect execution of a mortgage; a deposit of title deeds, or by a formal mortgage of an estate recognized only in equity.***

*Rev. Stat. Ohio, 4155-1; *Flanders v. Chamberlain*, 24 Mich. 305; 54 Wis. 193; 12 Wend. 61; 46 Ind. 595; *Jones, Chat. Mortg. c. 18*.

***Hammonds v. Barclay*, 2 East, 227; 3 Pom. Eq. Jur. Sec. 1234; 1 Beach, Eq. Sec. 287.

****Payne v. Wilson*, 74 N. Y. 348; 50 Conn. 104; 65 Tex. 238; 47 Ohio St. 306; 109 U. S. 211; 12 Wis. 413; 18 N. J. Eq. 104.

Equity not only enforces express liens created by the parties, but will create one where the considerations of justice require that one should exist. Thus, improvements made to land by an occupant, under the belief that he was the owner; repairs by a tenant in common to preserve the common property, may be recovered in equity from the owner or co-tenant.* Under this head fall the vendor's lien for the purchase price in whole or part remaining unpaid, already considered in the previous chapter, and the vendee's lien on default of the vendor to convey.

An equitable charge on land is created where it is devised subject to, or charged with, the payment of testator's debts and other legacies. Such an intention may be expressly stated in the will or implied from the whole instrument and the circumstances surrounding its execution.**

Sec. 1183. ASSIGNMENTS.—An assignment is defined to be the transfer or making over to another the whole of any property, of whatever description, or any interest therein; the term including the act of transfer, as well as the instrument effecting it.***

*Bright v. Boyd, 1 Story, 478; 8 Wheat. 77; 50 N. Y. 337; 19 Ill. 95; 79 Ky. 148.

**Stevens v. Flower, 46 N. J. Eq. 340; 79 N. Y. 136; 22 Conn. 595; Pom. Eq. Jur. Sec. 1246.

***Bouv. Law Dict. "Assignment." At law now, if the cause of action survives, and passes to the personal representative of a decedent as assets, or continues as liabilities against his representatives, it is assignable, otherwise not.

At the common law the assignment of possibilities and choses in action were not permitted, but they were recognized and enforced in equity whenever made upon a valuable consideration. The early common law rule is now abrogated, and the matter is largely regulated by statutes in the various states. In equity the assignment of a mere possibility or expectancy will be enforced, whenever such possibility or expectancy becomes a vested interest or possession, providing the property to be acquired at a future time is described with certainty.* So in equity, an order made payable out of a particular fund then due or which is to become due, from the drawee to the drawer, operates as an equitable assignment of the fund to the payee. But an ordinary check or draft not appropriating the fund does not operate as an assignment.**

The assignee of a chose in action takes it subject to all equities existing against the assignor, except in the case of the transfer of negotiable paper before due.***

*Holroyd v. Marshall, 10 H. L. Cas. 191; 124 Pa. St. 455; 79 Mo. 216; 90 N. Y. 387; 41 Minn. 219.

**Row v. Dawson, 1 Ves. Sr. 331; 120 U. S. 511; 151 Mass. 383; 55 Mich. 201; 71 N. Y. 325; 100 Ind. 515.

***Fairbanks v. Sargeant, 104 N. Y. 116; 130 U. S. 416; 23 N. J. Eq. 78; 41 Ohio, St. 403; 50 Mich. 544.

CHAPTER VI.

EQUITABLE REMEDIES CONSIDERED.

Sec. 1184. NECESSITY FOR EQUITABLE REMEDIES.—As equity undertook to give fuller and more perfect relief than could be had at law it followed that special remedies and a distinctive procedure would result in many actions. While at common law an action of damages was all the aggrieved party had for redress, equity allowed a bill for specific performance, injunction, cancellation, reformation, and the like, according to the nature of the case and the wrong to be righted or prevented. The various equitable remedies will now be discussed briefly, and some mention made of their purpose and application.

Sec. 1185. ACCOUNTING.—This was a common law action of great antiquity, but it was limited to certain cases, and the procedure was cumbersome and incomplete, in that the court could not compel a discovery or the giving of testimony by the parties to the action. The action at law fell into disuse, but equity took it up and gave the master in chancery power to examine the parties under oath and compel discovery and the production of all necessary papers and documents, and applied the action to many matters in addition to those at common law. It is applied in matters of administration, settling of estates,

the winding up of corporations and partnerships, and in England to matters pertaining to tithes. Equity does not, however, assume jurisdiction in all matters of account, but only where a fiduciary relation exists between the parties, or mutual accounts, or where there are circumstances of great complication and an accounting seems the most practical way of adjusting the matters.*

In an accounting, equity will allow the debtor at the time of payment to make the payment apply to the discharge of any designated debt, and the intention to so appropriate the payment may be either express or implied. If no such appropriation is made by the debtor then the creditor has the right to make the appropriation. And if neither the debtor or creditor have appropriated the payment, the law will do so by applying the credit to discharge the oldest indebtedness, except that it will not apply the payment to debts barred by the statute of limitations when there are debts not so barred.**

Sec. 1186. CONTRIBUTION — EXONERATION.—Equity allows a joint, or joint and several obligor on a contract, who has paid or satisfied more than his appropriate share of such obligation, to en-

*Smith, Prin. Eq. p. 497; 3 Bl. Com. 437; *Docker v. Somes*, 2 My. & K. 664; *Adams' Appeal*, 113 Pa. St. 449; *Uhlman v. Life Ins. Co.*, 109 N. Y. 421.

***Coleman v. Slade*, 75 Ga. 61; 100 Ind. 105; 77 Ala. 367; *Clayton's Case*, 1 Mer. 585; 6 DeG. M. & G. 474.

force *contribution* from his co-obligor.* And likewise one secondarily liable for the payment of a debt, not arising *ex delicto*, is entitled to *exoneration* from the primary debtor.**

Sec. 1186. SUBROGATION—MARSHALLING. Equity also allows the person paying a debt for which he is not primarily liable, to be substituted or subrogated to the position of the creditor, with the right to enforce against the real debtor all the securities, benefits and advantages held by the discharged creditor.*** And the court of equity will so *marshall* the assets of a debtor as to compel a creditor having resort to two funds to protect a creditor having resort to but one fund, by either compelling the double creditor to exhaust the fund not held by the other first, or subrogate the second creditor to the rights of the double creditor in the surplus of both funds.****

Sec. 1187. PARTITION—BOUNDARIES.—By partition is meant the segregation or separation of property owned in undivided shares, so as to vest in each of the former owners exclusive title to a specific portion, in lieu of his undivided interest in the whole.

*3 Pom. Eq. Jur. Sec. 1418; *Camp v. Bostwick*, 20 Ohio St. 337.

***White v. Miller*, 47 Ind. 385; 58 Conn. 22; 49 N. Y. 571.

****Pease v. Eagan*, 131 N. Y. 262; 61 N. H. 356; 124 U. S. 534; 90 Tenn. 306; 125 Mass. 506; 72 Ia. 338. The rule does not extend to volunteers so paying. 2 Beach Mod. Eq. 801.

*****Dolphin v. Aylward*, L. R. 4. H. L. 486; *Kerley*, Hist. Eq. p. 215; 30 W. Va. 204; 72 Ga. 751.

Partition was also allowed in a few cases at the early common law, but was later supplanted by equity and is now exclusively an equitable remedy in England. In America the matter is regulated by statutes in the various states, equity courts retaining their jurisdiction unless precluded by words of express prohibition.* Partition is a matter of right, in equity, and may be compelled by any co-owner entitled to the possession, but not while his interest is only in remainder or reversion.** Both real and personal property within the jurisdiction of the court may be partitioned.*** In the fixing of boundaries where they are in dispute, equity will only assume jurisdiction where there is some peculiar equity affected by the acts of the parties, or the dispute is as to the ownership of the soil, or the premises are in defendant's possession. And as the statutes have enlarged the jurisdiction of the law courts in such cases, equity has little to do in the case of disputed boundaries, since where there is an adequate legal remedy equity has no jurisdiction.****

Sec. 1188. SPECIFIC PERFORMANCE.—By specific performance is meant a judicial order that a

*Haynes, Eq. p. 99; 36 N. H. 332; 85 Ill. 341; 74 Ala. 203.

**Hawkins v. McDougall, 125 Ind. 597; 28 Vt. 228; 65 Miss. 60.

***Moore v. Darby, 18 Atl. Rep. 768; Turner v. Morgan, 8 Ves. 143. By statute if the property is incapable of division, the court may order it sold and the proceeds divided. 109 N. Y. 495; 69 Md. 1.

****Perry v. Pratt, 31 Conn. 433; Bouverie v. Prentice, 1 Brown, Ch. 200.

legal contract be actually carried into effect, or performed according to the terms of the contract. It is employed where damages for a breach would not give adequate compensation. Thus, generally, where the thing contracted for is specific and its exact counterpart cannot be purchased in the open market, equity will decree specific performance; so chattels of special value or interest, as works of art, keepsakes, heirlooms, contracted for, are proper subjects for a specific performance order.*

As a rule, contracts relating to personal acts, as hiring or service and agency will not be specifically enforced, since skill, care and the like could scarcely be enforced in a satisfactory manner.** As defenses to the action for specific performance, the defendant may show that the contract is not binding for want of capacity, in the contracting parties, that the contract has not been concluded or completed in its formation, or that it is illegal, and these defenses have the same effect in equity as at law, namely, making the contract unenforceable and being a bar to the action.*** Or the defenses may be, want of mutuality of obligation, hardship, want of fairness, and inadequacy of consideration, defenses peculiar to specific perform-

*Underhill, Eq. p. 196; *Hall v. Warren*, 9 Ves. 605; *Pusey v. Pusey*, 1 Vern. 273, 1 White & T. L. C. 1109; *McGowin v. Remington*, 12 Pa. St. 56; 68 Ia. 643.

***Lindsay v. Glass*, 119 Ind. 301; 83 Ala. 398; 85 Va. 653; 30 L. J. Ch. 409; 29 Mich. 166.

****Mayer v. McCreery*, 119 N. Y. 434; 53 Pa. St. 373; 62 Mich. 50; 104 Mo. 349; 91 Cal. 112; 25 S. C. 405.

ance, and allowing the court to refuse specific performance under the maxims, "he who seeks equity must do equity", and "he who comes into equity must come with clean hands".*

Laches on the part of the plaintiff will be ground for refusing specific performance, as will fraud and mistake in the contract.** A greater amount of certainty and definiteness is required in the contract which is to be specifically enforced than in an action for damages.*** The plaintiff must also make out a good title in himself, or one free from a reasonable doubt, and have performed the material and essential parts of the contract on his part to be entitled to have specific performance.**** The statute of frauds has not the same effect in equity as at law, and the section which provides that no action can be brought on a contract for the sale of land unless the same is in writing and signed by the party to be charged, will not prevent the court of equity from decreeing specific performance of such a contract not in writing, where there has been some part performance by plaintiff, or where fraud has prevented the contract from

*Rushton v. Thompson, 35 Fed. Rep. 635; 103 Mo. 513; 42 Minn. 482; 47 Mich. 449; 5 Pet. 269; 125 N. Y. 294; 99 N. C. 215; 83 Ky. 367; 130 Ill. 415; 135 U. S. 457.

**Ridgway v. Ridgway, 69 Md. 242; 118 Pa. St. 610; 45 N. J. Eq. 27.

***Woods v. Evans, 113 Ill. 186; 33 Ohio St. 147; 76 Wis. 662.

****Emmert v. Stouffer, 64 Md. 543; 120 N. Y. 253; 89 Ala. 429; 130 Ill. 42; 46 N. H. 464.

being put in writing, or where the defendant fails to plead the statute as a defense.*

Specific performance of a contract may be decreed where, though it cannot be strictly carried out according to its terms, yet with compensation for defects, the parties are put in substantially the same situation as if the contract had been literally fulfilled. Thus, there may be a discrepancy in the fulfillment of the contract as to time of performance or as to the subject matter, and yet equity will require specific performance along with compensation to the injured party to equalize the discrepancy.**

Sec. 1189. INJUNCTION.—An injunction is defined to be a judicial order, operating in personam, requiring a party to do or abstain from doing some particular act. If the order requires the performance of particular acts, it is called a mandatory injunction, while those requiring the defendant to abstain from doing particular acts are known as restraining orders. Mandatory injunctions are less common than those of a restraining character, but will be granted in a proper case, as to compel the abatement of a nuisance, or to do some act required by law.*** An injunction

*Maddison v. Alderson, 8 App. Cas. 467; 43 N. Y. 34; 45 N. J. Eq. 34; 77 Wis. 182; 125 Ill. 313; 45 Ind. 581; 1 Story, Eq. Jur. Sec. 161.

**Bostwick v. Beach, 105 N. Y. 661; 20 Beav. 56; 31 W. Va. 424; 112 Ill. 217; 139 Ill. 296; 57 Ind. 34.

***High, Inj. Sec. 1; Kerr, Inj. p. 9; 20 N. J. Eq. 379; Beach, Eq. Sec. 630.

with respect to duration may be either interlocutory or final. The interlocutory injunction, also called temporary or preliminary injunction, is one made pending the hearing of the cause on its merits, to prevent damage and preserve the property in *statu quo* until the action can finally be disposed of, at which time the injunction is either dissolved or made *final* or *perpetual*.*

To be entitled to an order of injunction, the complainant must show: that he has no plain, adequate and complete remedy at law, and that an irreparable injury will result unless the relief is granted. The equity court will then assume jurisdiction, and prevent the meditated wrong, or put an end to a continuing evil. By irreparable injury is meant, one not to be adequately redressed by damages, or of a burdensome nature, or one likely to destroy the subject-matter of the action.**

Injunctions will be allowed upon a proper showing in the following classes of cases:—

1. To restrain proceedings at law, where by accident, mistake, or otherwise, a party has an unfair advantage in a court of law, and it is against conscience that he should use that advantage. We have seen that this jurisdiction of equity was resisted by the law courts, but came to prevail nevertheless. The common law courts would not recognize equitable de-

*1 Mylne & K. 154; High, Inj. Sec. 5.

**Lumley v. Wagner, 1 De G. M. & G. 616; 50 Miss. 363; 67 Md. 44; 43 N. J. Eq. 342; 39 La. Ann. 901.

fenses, and so a party who had a proper defense at equity would lose at law, unless equity restrained the proceeding at law. The injunction was directed to the parties and not to the court of law, and for disobedience of the order the party restrained was adjudged in contempt. The court also issued injunctions against the enforcement of common law judgments, if after the judgment additional circumstances are discovered converting the action into an equitable controversy, and this would be the same if the circumstances discovered would have been cognizable at law, where they have been fraudulently concealed by the successful party.* The powers of the law courts have been so enlarged by legislation to correct errors and prevent injustice and hardship, that equity is seldom called upon to enjoin the collection of a judgment.**

2. To restrain breach of contract where the contract is of a negative character, and the breach would result in irreparable injury, or injury which could not be properly compensated in damages. Thus, equity will restrain the breach of a contract as to covenants in a deed or lease as to the use to which the premises may be put, as not to sell liquor, or erect certain improvements, and will restrain the breach of a contract not to enter into trade, where such limi-

*Story, Eq. Jur. Sec. 875; 61 N. Y. 378; Kerley, Hist. Eq. 89; 2 White & Tudor L. Cas. Eq. 111 et seq. 17 How. (U. S.) 443; 45 N. J. Eq. 5; 133 U. S. 152; 22 Wis. 311; 61 Tex. 412.

**3 Pom. Eq. Jur. Sec. 1365; 127 Ind. 511; 86 Mo. 333; 59 Md. 313.

tation is reasonable, and even to prevent the breach of a negative contract as to services, as not to perform the stipulated service for others.*

3. To restrain the commission of a tort, where a legal right exists and is threatened to be violated, and the violation is not to be adequately compensated in damages without a multiplicity of actions, and is of a weighty and not a trivial character. This class of cases is important, as it is independent of contract relations between the parties, and equity will assume jurisdiction to restrain the commission of a tort or wrong as to property, person or reputation in a proper case.**

To restrain the violation of a legal right the complainant must show the existence of the right which he asserts, and an actual violation of the right or a real existing danger of such violation; in addition to the fact that the injury is not susceptible of being redressed by an action for damages.*** The jurisdiction in such cases extends to protect real property, from waste, trespass and nuisance;**** to protect

*Beach, Mod. Eq. Jur. Sec. 768; 48 Ohio St. 324; 59 N. H. 459; 39 Kan. 193; 41 N. J. Eq. 323; 58 Pa. St. 51; 125 Mass. 258; Lumley v. Wagner, 1 De G. M. & G. 616; 18 Or. 221.

**Tuchman v. Welch, 42 Fed. Rep. 548; 3 Pom. Eq. Jur. Sec. 1338.

***Saunders v. Smith, 3 My. & C. 714; 32 N. J. Eq. 755; 54 Pa. St. 183; 3 My. & K. 174; 10 N. J. Eq. 57

****Brock v. Dole, 66 Wis. 142; 79 N. Y. 568; 6 Ves. 147; 82 Pa. St. 373; High, Inj. Sec. 739; Kerr, Inj. p. 106.

property rights in patents, copyrights, and trademarks,* and to protect other than property rights, where the violation results from a breach of trust, confidence or contract.**

4. Equity will also restrain the breach of a trust or confidence, or the violation of equitable rights, under proper circumstances. Thus, a trustee will be restrained from using his powers except for the legitimate purposes of the trust; a corporation at the instance of a stockholder may be restrained from doing acts beyond the scope of its charter; and public officers may be enjoined from doing acts inconsistent with their powers and duties.***

Sec. 1190. REFORMATION.—Equity will reform a written contract or other instrument *inter vivos* where, through mutual mistake, or mistake of one of the parties accompanied by the fraud of the other, such instrument does not truly express the intention of the parties.****

Sec. 1191. CANCELLATION.—Equity will cancel a written instrument or contract, where though utterly void, it is apparently valid on its face; and where

*Smith, Pr. Eq. p. 730; 105 U. S. 189; 101 U. S. 99; *Jefferys v. Boosey*, 4 H. L. Cas. 833; 46 Fed. Rep. 624

***Schuyler v. Curtis*, 64 Hun, 594; 19 N. Y. Supp. 264; *contra*, *Corliss v. Walker Co.*, 57 Fed. Rep. 434.

****Balls v. Strutt*, 1 Hare, 146; 2 Del. Ch. 188; 44 Miss. 202; 104 U. S. 450; 14 Ohio St. 31; 55 N. Y. 390; 5 R. I. 472.

*****Murphy v. Rooney*, 45 Cal. 78; 17 Conn. 559; 48 Wis. 331; 78 N. Y. 618.

the instrument is voidable on the ground of fraud or mistake.*

Sec. 1192. REMOVING CLOUD ON TITLE.—Whenever a deed or other instrument exists which may be vexatiously used after the evidence to impeach or invalidate it is lost, or which constitutes a cloud on title, and for which there is no proper proceeding at law, a court of equity will order the deed or instrument delivered up and canceled, or make any other decree which justice and right require. The matter is largely regulated by statute, and independent of statute the action can only be brought by one in possession.**

Sec. 1193. ANCILLARY REMEDIES—DISCOVERY.—In addition to the remedies which equity employs to adjudicate controversies and award relief, are certain remedies which are termed ancillary from the fact that they only serve to preserve the *status quo* of the property or assist in acquiring the means for the final determination of the matter. Discovery is one of these ancillary remedies. A bill of discovery prays for no relief, but simply for a discovery of facts within the knowledge of the defendant, or of deeds and writings in the possession or control of defendant; the object being to get the evidence for some other action in a court of law, already instituted, or

*Underhill, Eq. p. 215; 3 My. & C. 97; 96 Mo. 324.

**Story, Eq. Jur. Sec. 694; 113 Pa. St. 510; 110 U. S. 86; 68 Mich. 220; 123 Ill. 666; 72 Wis. 420.

to ascertain the proper party defendant at law.* The remedy was to correct the common law which made the parties to the action incompetent to testify, which of course has been remedied by statute long since.** Three controlling rules regarding discovery were formulated, as follows: 1. No man need discover matter tending to criminate himself, or to make him liable to a penalty or a forfeiture.*** 2. No man need discover legal advice which has been given him by his advisers, or the statements of facts which have passed between him and his advisers, nor a married woman discover facts to the damage of her husband.**** 3. Public officials need not disclose matters of state prejudicial to the community.*****

Sec. 1194. SAME SUBJECT—BILLS TO PERPETUATE TESTIMONY.—Chancery will entertain a bill to perpetuate testimony where it is in danger of being lost before the matter to which it related could be made the subject of judicial investigation. The matter is now regulated by statute and the remedy by bill in chancery is not resorted to for this purpose.*****

*Snell, Eq. p. 718; 8 Ves. 404; 1 Sim. & S. 83.

**Fenton v. Hughes, 7 Ves. 287; 2 Story, Eq. Jur. Sec. 1499.

***East India Co. v. Campbell, 1 Ves. Sr. 246; 116 U. S. 616; 109 Mo. 118; 97 Pa. St. 147.

****Greenough v. Gaskell, 1 My. & K. 98; 5 Ves. 322.

*****Smith v. East India Co., 1 Phil. Ch. 50.

*****Snell, Eq. p. 721; Angell v. Angell, 1 Sim. & S. 83; 32 Beav. 299.

Sec. 1195. SAME SUBJECT—EXAMINATION OF WITNESSES *de bene esse*.—A bill in equity could also be maintained by either party to a controversy, praying for a commission to examine witnesses who were old and infirm, or who might not be present at the trial by reason of being abroad, and thus preserve the testimony which might otherwise be incapable of being produced. Such bills could only be brought during the pendency of the action, not before.*

Sec. 1196. SAME SUBJECT—THE WRIT OF *ne exeat*.—The writ of *ne exeat* is a writ issued by courts of equity to prevent a person from leaving the state until bail has been given to obey the decrees or orders of the court. It is only issued in cases of equitable debts and claims and operates in the nature of equitable bail. The demand must be certain in nature and not contingent or prospective.** In some cases it may be issued before suit is brought.*** And when alimony has been decreed to a wife, and where the balance claimed by plaintiff is larger than admitted by defendant the writ may be used to prevent the defendant evading his obligation by leaving the state.****

*Angell v. Angell, 1 Sim. & S. 83.

**Bonesteel v. Bonesteel, 28 Wis. 245; 5 Cush. 241; 68 Ill. 100.

***Clark v. Clark, 26 Atl. Rep. 1012.

****Denton v. Denton, 1 Johns. Ch. 364; 7 Ves. 171; 24 Ga. 406.

Sec. 1197. SAME SUBJECT—INTERPLEADER.—Where two or more persons, between whom there is privity of title, claim the same thing, debt or obligation from a third party, such third party, if he does not himself claim any interest in the matter, and has incurred no independent liability to either of them, may file a bill of interpleader against them setting forth their several claims and his own position in the matter, praying that the claimants may interplead, that the court may adjudge to whom the subject of dispute properly belongs, and if suits at law have been brought against him, he may also pray that such suits be restrained until the matter is adjudicated. The matter is largely regulated by statute permitting a defendant to substitute a third person in his place where he has no interest in the action.*

Sec. 1198. SAME SUBJECT—RECEIVERS.—A receiver is a party appointed by a court of equity to take charge of the property or fund in controversy, pending final adjudication, when it does not seem best that either party should retain it. The application for the appointment of a receiver does not affect or determine the ultimate rights of the parties, but the plaintiff should show that he has a clear right to the property or some lien or claim upon it, and that the defendant obtained it through fraud, or that the

*Crawford v. Fisher, 1 Hare 436; 31 Mich. 85; Civ. Code, N. Y. Sec. 820; Adams Eq. p. 203; 3 Pom. Eq. Jur. Sec. 1322; Story, Eq. Jur. Sec. 820.

property or the income therefrom is liable to be wasted or lost by the neglect, misconduct or insolvency of the defendant, in order to justify the court in exercising its discretion to appoint a receiver.*

Sec. 1199. SAME SUBJECT—WHEN A RECEIVER WILL BE APPOINTED.—In a proper case, a receiver will be appointed, where the person entitled to the possession of property pending litigation concerning it is incompetent to take such possession, as infants, lunatics and the like; so a receiver will be appointed where both parties are equally entitled to possession, as co-tenants, partners, and the like, but it is best for some third person to be in control, and where the party entitled to possession is wasting, destroying or misapplying the property or its proceeds; so a receiver will be appointed in order to reach property of a judgment debtor which cannot be seized on execution, and by statute one may be appointed in proceedings to dissolve and wind up corporations.**

*Booth v Clark, 17 How. 322; High, Rec. Sec. 1; 107 Mass. 1; 57 Pa. St. 83; 92 N. C. 519; 41 Kan. 475; 11 Md. 365; 85 Ala. 371.

***Hicks v. Hicks, 3 Atk. 273; Word v. Word, 90 Ala. 81; 82 N. C. 165; 79 Ga. 367; 2 Paige, 342; 2 N. J. Eq. 173; 77 N. Y. 272; 2 Tenn. Ch. 398.

QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

SALES OF PERSONAL PROPERTY.

CHAPTER I.

1051. Explain the importance of the law of sales, and give the more accurate designation of the subject.

1052. Define a sale, and name the four essential elements in a contract of sale.

1053. What is the difference between bargain and sale and an executory agreement of sale?

1054. How is a contract of sale to be distinguished from, —bailment; pledge; chattel mortgage; assignment; consignment; gift; and exchange?

1055. Name the principal authorities on the law of sales.

CHAPTER II.

1056. What general rules apply as to the capacity of the parties to the contract of sale?

1057. Discuss each of the class of cases in which a party may sell though not the owner of the property sold. What is the general rule?

1058. Discuss who may buy, giving the general rule and the exceptions.

1059. How may the mutual assent of the parties be made? When an offer to sell is made when does it become binding

on the other party? When must acceptance of an offer be made? What is necessary to constitute an acceptance?

1060. Discuss the offer and acceptance in a contract of sale made by post and by telegraph.

1061. When will a contract of sale be implied without any expression of the will or intention of the parties? What remedy has the owner for property taken wrongfully?

1062. What effect has mistake on assent in a contract of sale? Explain fully, discussing the case of *Wood v. Boynton*, and the effect of a mistake as to quality or a single point. When will a contract be void for uncertainty?

CHAPTER III.

1063. What is the effect of a contract to sell a thing which has ceased to exist? Why? What is the liability for a failure to perform such a contract?

1064. May an article not yet in existence be the subject of sale? What class of such articles may be the subject of an executed sale? What is meant by potential existence? What may be said of things being sold which have not a potential existence? When does the title pass in such cases? What may be said as to sales for future delivery?

1065. Of what may the price consist, and how is it ascertained? What is meant by a fixed price? If nothing is said as to price how is it determined? What is a reasonable price, and how is it determined?

CHAPTER IV.

1066. What was the purpose of the Statute of Frauds, and what was the effect of the 17th section? Give the substance of this section. Who may take advantage of the contract being within the statute of frauds? If the contract is partly within and partly without the statute, what is the effect?

1067. Are executory agreements within the statute of frauds? Explain fully. What was the effect of Lord Tenterden's Act? Give Lord Blackburn's rule for determining

what contracts fell within the statute of frauds, and what are contracts for work and labor. Discuss the holdings in America as to what are contracts for work and labor, and give the three principles of construction laid down by Schouler.

1068. Are sales at auction and by sheriffs within the statute of frauds?

1069. What may be said as to the contract for taking back the goods being within the statute?

1070. What classes of property are included within the words "Goods, wares and merchandise" in America? In England?

1071. What may be said as to fixtures and growing crops when sold coming within the statute of frauds? Under which section does a contract for the sale of fixtures come? What classes of growing crops, and under which section does a sale of each fall?

1072. Discuss what contracts fall within the clause "price or value of ten pounds or upwards."

1073. What exceptions or conditions are there to the statute of frauds taking effect?

1074. What is the distinction between acceptance and receipt?

1075. Give the propositions determining what constitutes an acceptance. What is the purpose of requiring actual receipt and acceptance? When may an acceptance be given?

1076. Discuss what constitutes an actual receipt, when the goods are in possession of the buyer as agent for the vendor; in the possession of a third person, and in the possession of the vendor; delivery to a carrier.

1077. What is meant by earnest? By part payment? What will constitute part payment?

1078. What may be said as to the provision of the statute of frauds as to a note or memorandum in writing as affecting the rules of evidence as to the admission of evidence?

1079. What may be shown by parol evidence in regard to a note or memorandum of the contract of sale?

1080. Discuss what will constitute a note or memorandum in writing. May the note be on separate pieces of paper?

1081. What must the memorandum show to be sufficient?

Discuss fully. What is meant by a signature? What may be said as to the broker's bought and sold notes constituting a sufficient memorandum?

CHAPTER V.

1082. What is the distinction between executed and executory contracts as to passing title in the thing sold? Discuss fully.

1083. What is the effect of the contract where the sale is of a specific chattel unconditionally?

1084. What is the effect of the contract where the chattels are specific but the sale is conditional? Give the three rules applicable to the subject. Discuss the case of *Brandt v. Bowlby*. Discuss the effect of a contract in which the payments are to be made in installments.

1085. What is the effect of a contract for the sale of a chattel or chattels not specific? What is the effect as to articles to be manufactured? As to the sale of a portion of a larger quantity of the same material? What is the holding as to grain stored in elevators?

1086. May the contract be completed by the subsequent appropriation of specific goods to the contract? What is the rule as to who may make the selection or election of goods to the contract?

1087. What is the effect of the contract of sale when the vendor has reserved expressly or by implication the ownership of the goods? How may the *jus disponendi* be reserved?

CHAPTER VI.

1088. What other subjects are connected with conditions in sales? Define a representation and state when it constitutes a condition precedent and when an independent covenant. What may be said in regard to the application of the rules determining conditions?

1089. Is impossibility of performance an excuse for failure to perform a condition precedent? Why?

1090. Must a condition dependent upon the act of a third person be performed? What is the rule as to giving notice of the happening of a future event?

1091. Discuss the effect of sales "to arrive" or "on arrival." What is meant on the sale of a "cargo?" What is a common condition in regard to sales on arrival?

1092. What is meant by concurrent or mutual conditions? Give an example. What is the effect of a failure to deliver the first installment of an entire contract deliverable in installments? What is the effect of a failure to pay for such an installment? Give reason for answer.

1093. What is the implied condition in sales by sample? How does sale or return differ from a sale on trial? What is the effect of selling goods by a particular description?

CHAPTER VII.

1094. Define a warranty, and discuss its effect on the contract.

1095. Discuss what is necessary to constitute an express warranty, and the elements to be considered in determining whether one exists. Give the well-settled proposition in regard to express warranties. May an oral warranty be shown to a formal written agreement which does not mention warranty? What is said as to warranties as regards unsoundness in horses? To what does the warranty apply as a rule? May an agent warrant?

1096. What is meant by implied warranties, and from what do they spring? What is the rule where there is an express warranty as to one thing?

1097. Give the established rules to determine when there is an implied warranty of title. Does the vendor by the mere act of sale warrant that he has title? What is the rule in sales by public officers? What is the American rule as to the implied warranty as to identity? As to genuineness in sales of commercial paper?

1098. What is meant by *caveat emptor*? To what extent is the maxim applicable in America? If a chattel is made to order for a purpose or for a specific use what warranty attaches? What warranty is implied in sales by sample? What constitutes a sale by sample? In sale by sample and the goods do not conform to the sample what is the duty of the buyer? How long does the warranty of merchantability last?

1099. What important exception to the rule of caveat emptor as to implied warranty of quality?

CHAPTER VIII.

1100. Discuss the vendor's duty to deliver, and explain what is meant by delivery on the part of the vendor.

1101. What is necessary to constitute a delivery by the vendor to pass title or property? Must the vendor send the goods to the buyer in the absence of agreement, custom or usage? When must the buyer give notice before delivery is necessary?

1102. What may be said as to the place of delivery, and the time within which they must be sent?

1103. Discuss the sufficiency of the delivery as to quantity, and explain what is meant by symbolical delivery and when it may be made. What may be said as to the delivery of growing crops?

CHAPTER IX.

1105. What are the buyer's duties generally? For what does the vendor become liable if he defaults in taking away the goods from the place of sale? Who determines what is a reasonable time?

1105. When should acceptance be made as regards delivery? What may the buyer do as to examining the goods before acceptance? If the goods are not according to contract what should the buyer do? What is the effect of retaining the goods and using them by the buyer?

1106. When must the buyer pay, and in what ways may payment be made?

1107. Define and discuss what is meant by tender. May the buyer demand a receipt on tender of the price?

1108. What sort of a payment is payment by promissory note? Discuss fully, and give the rule when the payment is made by giving the note of a third person. When suit is brought by the vendor, where a note has been given, what must he do as to the note? When will payment be presumed?

CHAPTER X.

1109. Define mistake, and discuss when a contract of sale may be set aside on the ground of failure of consideration. If the buyer gets what he bargained for, and it proves worthless, is this a failure of consideration?

1110. What is the effect of fraud on a contract of sale? Explain what is meant by fraud. Give the elements of fraud as stated by Mr. Benjamin. On whom may the fraud be perpetrated in a contract of sale?

1111. What is the general holding now as to the effect of the fraud as to title passing to the fraudulent buyer? When may such a buyer pass title to an innocent purchaser for value? What must the vendor do to rescind? What must an innocent purchaser show as against the vendor under a contract induced by fraud? What are the main grounds for rescinding a sale for fraud on the vendor?

1112. What are the rights of the buyer where he has been induced to make the contract through fraud? What must he do to rescind? What is sufficient to constitute a fraud on the buyer? Give the elements which must exist to constitute such a fraud or deceit. What may be said as to false statements furnished to a commercial agency as constituting fraud? What will constitute a fraud at an auction sale?

1113. If the fraud exists as against creditors what is its effect as to vendor and vendee? Explain and discuss what will constitute a fraud on creditors. What is the general holding as to a sale where the vendor continues in the apparent ownership, use and possession of the thing sold?

CHAPTER XI.

1114. What are the rights of the vendor, the property not having passed, for a breach of the contract of sale? What is the rule of damages?

1115. What is the vendor's remedy where title has passed?

1116. Define and discuss the vendor's remedies against the goods on breach of contract, where the title has passed,

and the goods are still in his possession, and where the goods are in transit to the buyer. Does the buyer's failure to pay the price rescind the contract?

1117. Define and explain what is meant by a lien. When is a lien implied? How may it be waived or abandoned? How is it lost or waived when the goods are in the hands of a third person? If part of the goods are delivered, may the rest be held for the whole price?

1118. What may be said as to the vendor's right to resale where the buyer has not paid for them and taken them away? May it be done in America? What steps should be taken in such a resale?

1119. What do you understand by the right of stoppage *in transitu*? What is it based on? How many parties must there be? May it be exercised by other than the vendor of goods? May it be exercised where a part payment or conditional payment by note or bill has been made? What is meant by insolvency, and how is it shown?

1120. Explain and discuss when the transit may be said to begin and end. What may be said where the goods are in a warehouse at the end of their journey? Will a deliver of a part of the goods to the buyer defeat the right?

1121. Explain the method by which the right is exercised. What is the liability of the carrier in such cases?

1122. Explain by what method or methods the right may be defeated.

1123. What is the effect of a stoppage *in transitu*? May the buyer tender the price before resale and get the goods?

CHAPTER XII.

1124. From what may the breach of contract arise for which the buyer can claim redress?

1125. What are the buyer's remedy for a breach on the

1125. What is the buyer's remedy for a breach on the property? What is the rule of damages?

1126. What are the buyer's remedies for breach when the contract is executed and title has passed? If sued for damages, may the vendor counter-claim for the unpaid price?

1127. After obtaining possession and title of the goods,

what further remedy has the buyer against the vendor for a breach of the contract? Discuss each remedy. What is the general rule of damages in an action for breach of a warranty? When may a bill in equity for specific performance be maintained in a contract of sale?

EQUITY OR CHANCERY JURISPRUDENCE.

CHAPTER I.

1128. What may be said as to the origin of the court of chancery? Explain the method of government among the Anglo-Saxons and Germans. When did the king come to be regarded as the fountain of justice? What was the *Curia Regis*? Who was one of the principal officers in the kingdom under the feudal system? What does Blackstone say as to this officer? What were his powers and duties? Why was the Chancellor called the "Keeper of the king's conscience?" What writs did the Chancellor issue? What was the purpose of the statute of Westminster II? When did the court of chancery assume to give relief in cases not cognizable by the law courts? What was the origin and purpose of the writ of *subpoena*? When were matters of grace referred by statute to the Chancellor? How were appeals to the Chancellor or suit in equity instituted? What may be said as to the nature of the relief granted in chancery, and to what beneficial use was it early put? How did the court of equity differ from the law court in the matter of fines and costs? What conflict arose between the law courts and the chancery? How did it end? What is the present state of the chancery courts in England?

1129. Discuss the early history of chancery courts in the United States. How was equity administered in Pennsylvania during colonial times? Was the chancery a separate tribunal in most of the States?

1130. By the adoption of the code system in some states, what three systems of administering equity in the United States now prevail? Explain each, and state which system prevails in your State.

1131. Define and explain what is meant by equity or chancery law? How does Sir Henry Maine characterize equity?

1132. Name the leading authorities on equity jurisprudence.

CHAPTER II.

1133. Has equity jurisdiction over criminal matters? Explain fully.

1134. What general principle or doctrine limits the jurisdiction of equity courts? Illustrate and explain.

1135. If equity has established its jurisdiction, and the law courts also assume jurisdiction, will the equity jurisdiction be divested?

1136. When will equity retain jurisdiction to give relief, though the matter involves purely legal questions?

1137. Explain how and when equity will assume jurisdiction in order to avoid a multiplicity of suits.

1138. What criticism was early made against equity courts? Does equity now follow precedents in making decisions? What is meant by the maxims of equity, and how are they classified as to their character and effect?

1139. What is meant by prerequisite maxims? Discuss and illustrate the maxim that "He who seeks equity must do equity." Discuss and illustrate the maxim that "He who comes into equity must come with clean hands." Discuss and illustrate the maxim that "Equity aids the vigilant, not the slothful." What is this rule called in equity?

1140. What is meant by descriptive maxims? Explain the maxim, "Equity acts specifically, and not by way of compensation." Explain the meaning and effect of the maxim that "Equity acts *in personam* and not *in rem*." Explain the maxim, "Equity follows the law," and state the limitations of its application.

1141. What is meant by substantive maxims? Discuss

the maxim, "Equity suffers no wrong without a remedy." Why is this maxim said to be the foundation of equity jurisdiction? Discuss and explain the application of the maxim, "Equity regards that as done which ought to have been done." Will the maxim be enforced to the inquiry of innocent third persons? Explain and discuss the maxim, "Equity regards the substance and intent, not the form." Illustrate the application of the maxim. Explain and illustrate the maxim, "Equity imputes an intent to fulfill an obligation." Explain and illustrate the maxim, "Equality is equity." Explain the meaning of the maxim, "Where the equities are equal the law will prevail." To what equitable doctrine does this maxim give rise?

1142. What is meant by the equitable doctrine of estoppel? What are the elements necessary to create an estoppel? What is the effect of estoppel?

1143. Define and discuss the doctrine of election in equity. When does it become necessary? What rights have the various parties required to elect? What is the effect of an election once made?

1144. What is meant by satisfaction in equity? To what extent is oral evidence admissible in regard to an oral gift? How is the intent of the grantor to be determined? When is the doctrine applicable? Illustrate.

1145. From what maxim does the doctrine in regard to performance arise? What is the effect of the doctrine?

1146. What is meant by equitable conversion, and from what maxim does it arise? When does the conversion take place under the doctrine? What is the effect?

1147. What is meant by notice as an equitable doctrine? When does it become important? What two kinds of notice? Explain each. What is the doctrine applicable to *lis pendens*?

1148. Explain and define what is meant by a *bona fide* purchaser in equity. Will purchasers from a *bona fide* purchaser be protected?

1149. What is the doctrine of equity in regard to penalties and forfeitures? Does it extend to statutory penalties? What other limitations on the doctrine?

CHAPTER III.

1150. What is meant by accident in equity? What is the jurisdiction of equity as regards accident?

1151. What two things must concur to warrant equitable relief in cases of accident? How may a party be injured so as to give rise to equitable jurisdiction? Explain each, and illustrate. Give the instances of accidents for which equity grants relief enumerated by Prof. Bigelow.

1152. What may be said as to Mistake as a ground for equitable relief? What is meant by mistake of fact, and in what does it consist? When will mistake of law constitute a mistake to be relieved against?

1153. What may be said as to mistake of law, and the reasons given for not relieving against it? When will courts of equity regard a mistake of law as one of fact? What law is it that ignorance of does not excuse? What is done when the mistake arises from a statute subsequently declared void? When money is paid under a mistake of law, what is the effect?

1154. What is the presumption as to knowing facts? What mistake of fact will equity relieve against? Discuss fully. If the fact is extrinsic to the contract will equity relieve? If the mistake is mutual what is the effect? If it is only a mistake of one of the parties? What other maxim must be remembered in this connection?

1155. Why is equity jurisdiction concurrent in cases of fraud? Into what classes was fraud divided by Lord Hardwicke? Into what two general classes is fraud divided?

1156. What is meant by actual fraud? What are the elements necessary to make a misrepresentation constitute a fraud? May fraud result from the suggestion of a falsehood or the suppression of the truth? What are the rights of a party defrauded in equity? How far will the equity court follow property taken by fraud?

1156a. Wherein does constructive fraud differ from actual fraud? Into what classes are constructive frauds divided?

1157. Discuss constructive frauds arising from contracts made in violation of some statute.

1158. What are the classes of contracts made in violation

of public policy which are regarded as constructive frauds? How are they regarded in equity? What conditions may be annexed to legacies in restraint of marriage? May husband and wife separate and agree to live apart? What are the limitation contracts in restraint of trade? Will a contract seeking private gain at the expense of the public service be upheld? Why? What may be said as to lobbying?

1159. Name and discuss the classes of persons standing in confidential relations who will be protected from having such relation or confidence used to their injury? Explain the rules applicable to each of such fiduciary relations.

1160. What classes of persons are protected in equity? Why? What is meant by post obit bonds? What is the equitable holdings as to the contract of suretyship? What does equity require of a debtor in making composition with creditors? What is the equitable doctrine in regard to conveyances of property with intent to defraud creditors? What presumptions arise in the case of a conveyance without consideration? How may this presumption be overcome?

CHAPTER IV.

1161. Give the historical origin of uses and trusts. What was the effect of the statute of uses?

1162. How are trusts classified? What classification of express trusts is made? Define and explain a pure or passive trust, and a special trust. When are trusts said to be executory and when executed? What construction is put on technical words in executory and executed trusts?

1163. Define an express private trust, and designate the parties thereto.

1164. What classes of property are subject to the creation of a trust?

1165. Explain and discuss voluntary trusts, and trusts for value. Why may a voluntary trust be good as between the parties and void as to creditors? What is the effect of a general assignment for creditors in America? How are trust deeds made to take the place of mortgages? How are they regarded where customarily used? What are the duties and obligations of the trustee?

1166. Explain how express trusts are created. If the language is optional to the trustee, is the trust well created? What is meant by a quasi trust? How is the creation of trusts affected by the statute of frauds? Does the statute of frauds apply to trusts in personalty? What is necessary as to the writing to satisfy the statute of frauds? How may the intention to create a trust be made to appear?

1167. What is meant by an express public or charitable trust? What must be the object of such a trust? What purposes have come to be recognized as public, so that trusts may be created for their benefit? Discuss and explain each.

1168. How are public trusts created and construed?

1169. What is meant by the doctrine of *cy-pres* as applied to public or charitable trusts? Explain fully.

1170. What may be said as to implied or resulting trusts to charities?

1171. From what does an implied or resulting trust spring? What must be shown to raise such a trust? What will not constitute such a trust? For whom will the presumption of an implied trust be made? For whom will it not be made?

1172. What becomes of the residue of property conveyed to a trust? Illustrate.

1173. Discuss the disposition of trust property on the failure of heirs. In the case of joint tenants, and joint owners of a mortgage, what is the equitable doctrine?

1174. What do you understand by constructive trusts? Discuss the instances of such trusts.

1175. Discuss how a trust results from the renewing of a lease by a partner, trustee, and the like, in his own name.

1176. Discuss resulting trusts from benefits bestowed on property belonging to others, and illustrate.

1177. When will a resulting trust arise from the receiving of money?

1178. Illustrate when property purchased with trust funds will constitute a resulting trust.

1179. Discuss trusts arising *ex delicto*, or from torts. Illustrate. In such cases who is the owner of the property?

CHAPTER V.

1180. How are real estate mortgages regarded in equity? What is meant by the "equity of redemption?" What other instruments and contracts will be regarded in equity as mortgages? Why? Explain what is meant by foreclosure of a mortgage, and how it is accomplished and what is the result.

1181. What is meant by a chattel mortgage? How are they regarded in equity?

1182. What is meant by an equitable lien? By an equitable mortgage? Explain under what circumstances equity will create a lien on land or charge against same.

1183. Define an assignment. What assignments will be upheld in equity that are disregarded at law? How does the assignee take?

CHAPTER VI.

1184. Explain the necessity for the existence of equitable remedies.

1185. Explain and discuss Accounting as an equitable remedy. What are the equitable rules as to the application of payments in accounting?

1186. What is meant by contribution in equity? By exoneration?

1187. What is meant by subrogation? Illustrate. Explain what is meant by marshalling in equity.

1188. Define partition, and explain how it came to be an equitable remedy. When will equity assume jurisdiction to fix disputed boundaries?

1189. What is meant by specific performance? When will it be decreed as to chattels? What contracts will not usually be specifically enforced? What effect has laches in a bill for specific performance? May it be decreed though the contract cannot be strictly carried out?

1190. Define and discuss the equitable remedy by injunction. What kinds of injunctions are there? What showing should be made for the allowance of an injunction? In what classes of cases will they be allowed? Discuss each class.

1191. What is meant by reformation in equity? When will it be employed?

1192. What is meant by cancellation in equity and when will it be employed?

1193. When will equity interfere to remove a cloud on title? Is the remedy statutory?

1194. What are meant by accillary remedies? Explain what is meant by discovery. What are the controlling rules?

1195. When would chancery entertain a bill to perpetuate testimony?

1196. What is meant by the examination of witnesses *de bene esse*? When could such a bill be brought?

1197. What is the writ of *ne exeat*? For what was it used? When may it be used before suit is brought?

1198. Discuss and explain what is meant by interpleader, and what is necessary in such a bill.

1199. What is meant by a receiver, and when will a receiver be appointed by a court of equity? What should be shown?

1200. Illustrate when a receiver will be appointed.

ABBREVIATIONS.

"See also the abbreviations given in previous numbers.)

A. & E. or AD. & EL.—Adolphus & Ellis' Reports, English King's Bench.

Amb.—Ambler's Reports, English Court of Chancery.

Atk.—Atkyn's Reports, English Chancery.

B. & P.—Bosanquet & Puller's Reports, English Common Pleas.

Blackf.—Blackford's Reports, Indiana Supreme Court.

Bosw.—Bosworth's Reports, New York City Superior Court.

Bro. C. C. or Brown Ch.—Brown's Chancery Cases, English Chancery.

Camp.—Campbell's Reports, English Nisi Prius.

Ch.—Chancery Reports.

Ch. D.—Chancery Division Reports.

Cl. & Fin. or C. & F.—Clark & Finelly's Reports, Eng. House of Lords.

Com. Dig.—Comyns' Digest.

Cro. Jac.—Croke's Reports, Eng. King's Bench and Common Pleas.

Cr. & J. or Cromp. & J.—Crompton & Jervis's Reports, Eng. Exchequer.

Cr. & M.—Crompton & Meeson's Reports, Eng. Exchequer.

Cr. & P. or Craig & P.—Craig & Phillips' Reports, English Chancery.

DeG. F. & J.—DeGex, Fisher & Jones' Reports, English Chancery.

De G. J. & S.—DeGex, Jones and Smith's Reports, Eng. Chancery.

De G. M. & G.—DeGex, McNaughton & Gordon's Reports, Eng. Chancery.

De G. & J.—DeGex and Jones' Reports, Eng. Chancery.
 Dill.—Dillon's Reports, U. S. Circuit Court.
 Doug.—Douglas' Reports, English King's Bench.
 Drew.—Drewry's Reports, English Chancery.
 Eden.—Eden's Reports, English Chancery.
 E. & E. or El. & E.—Ellis & Ellis' Reports, Eng. Queen's Bench.
 Eq. or Eq. R.—Equity Reports, Eng. Chancery and Appeals from Colonial courts.
 Esp.—Espinasse's Reports, Eng. Nisi Prius Cases.
 Freem.—Freeman's Reports, Eng. King's Bench and Chancery.
 H. & C.—Hurlstone and Coltman's Reports, English Exchequer.
 H. & M. (Md.).—Harris & McHenry's Reports, Maryland Provincial Court, and Court of Appeals.
 H. & J.—Harris and Johnson's Reports, Maryland Court of Appeals.
 Har. Ch. (Mich.).—Harrington's Reports, Michigan Chancery.
 Hare.—Hare's Reports, English Chancery.
 Harv. L. Rev.—Harvard Law Review.
 Heisk.—Heiskell's Reports, Tennessee Supreme Court.
 Jacob.—Jacob's Reports, English Chancery.
 J. & H.—Johnson and Heming's Reports, English Chancery.
 Johns. Ch.—Johnson's Reports, English Chancery.
 Jur.—The Jurist.
 K. & J.—Kay and Johnson's Reports, English Chancery.
 M. & G.—Manning & Granger's Reports, Eng. Common Pleas.
 Moo. P. C.—Moore's Privy Council Cases, Eng. Privy Council.
 My. & Cr.—Mylne & Craig's Reports, English Chancery.
 My. & K.—Mylne & Keen's Reports, English Chancery.
 N. J. Eq.—New Jersey Equity Reports, Chancery and Court of Errors and Appeals.
 Or. or Oreg.—Oregon Reports, Supreme Court.
 Phill. Ch.—Phillips Chancery Reports, English Chancery.
 P. Wms.—Peere Williams' Reports, English Chancery.

Ry. & Moo. or Ry. & M.—Ryan & Moody's Reports, Eng. Courts Nisi Prius.

Sawy.—Sawyer's Reports, U. S. Circuit Courts.

Sim.—Simond's Reports, Eng. Chancery.

Sim. & S.—Simons and Stuart's Reports, Eng. Chancery.

Sch. & Lef. or Sch. & L.—Schoale and Lefroy's Reports, Irish Chancery.

Sm. L. C.—Smith's Leading Cases.

Taunt.—Taunton's Reports, Eng. Common Pleas.

Up. Can.—Upper Canada Reports.

V. or vs.—*Versus*, against.

V. & B.—Vesey & Beames' Reports, English Chancery.

Ves. or Ves. Sr.—Vesey's Reports (Senior), Eng. Chancery.

Ves. Jr.—Vesey Junior's Reports, English Chancery.

Vern.—Vernon's Reports, English Chancery.

W. & S. or Watts & S.—Watts & Sergeant's Reports, Pennsylvania Supreme Court.

White & T. L. Cas.—White & Tudor's Leading Cases in Equity.

CONTENTS.

	Page.
Preface	iii
Abbreviations	v

SALES OF PERSONAL PROPERTY.

CHAPTER I.

Scope and Meaning of the Subject of Sales	1
Definitions and Essentials of a Sale	2
A Sale, or Bargain and Sale, Distinguished from Contract of Sale, or Executory Agreement	5
A Sale Distinguished from other Transactions	6
Authorities on the Law of Sales	11

CHAPTER II.

CONCERNING THE PARTIES AND MUTUAL CONSENT.

Of the Parties to the Contract in General	12
Same Subject—Who May Sell	12
Same Subject—Who May Buy	16
Mutual Assent—How Expressed	18
Same Subject—Sales Contracted by Mail and by Telegraph	22
Same Subject—Implied Contract	23
Same Subject—Mistake Annuls Assent	26

CHAPTER III.

CONCERNING THE THING SOLD AND THE PRICE.

Sale of a Thing Which has Ceased to Exist	33
---	----

	Page.
Sale of Things not yet in Existence	34
The Price May be Express or Implied	39

CHAPTER IV.

EFFECT OF THE STATUTE OF FRAUDS ON SALES.

The Statute of Frauds—17th Section	42
What Contracts are Embraced under the 17th Section?..	46
Same Subject—Auction Sales	52
Same Subject—Rescission	53
What are Goods, Wares and Merchandise?	53
Same Subject—Fixtures, Growing Crops, Etc.....	55
Construction of the Words “Price or Value of Ten Pounds or Upwards”	57
Exceptions under the Statute of Frauds	59
Same Subject—Except the Buyer shall Accept Part and Actually Receive Same	60
Same Subject—What Constitutes an Acceptance?	61
Same Subject—What Constitutes an Actual Receipt	64
Second Exception—Earnest to Bind the Bargain or Part Payment	67
Third Exception—Note or Memorandum in Writing	69
Same Subject—What may be Shown by Parol Evidence ..	70
What is a Note or Memorandum in Writing	73
Same Subject—What is a Sufficient Memorandum	74

CHAPTER V.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

Meaning of this Chapter with Division of Subject	79
Where the Sale is of a Specific Chattel Unconditionally..	81
Chattels Specific, But Sale Conditional	82
Where the Chattels are Not Specific	88
Subsequent Appropriation of Specific Chattels on Execu- tory Agreement	91
Where the Jus Disponendi is Reserved	94

CHAPTER VI.

CONDITION IN SALES.

	Page.
General Principles and Definitions	98
Same Subject—Impossibility of Performance	102
Same Subject—Sales Dependent Upon Acts of Others, Or Some Contingent Event	103
Same Subject—Sales to Arrive	104
Same Subject—Concurrent or Mutual Conditions	106
Same Subject—Sales by Sample, On Trial, Etc.....	107

CHAPTER VII.

WARRANTY IN SALES OF PERSONAL PROPERTY.

Warranty Defined and Explained	110
What Constitutes an Express Warranty	111
Implied Warranties	114
Implied Warranty of Title	115
Implied Warranty as to Quality of Goods—Caveat Emp- tor	118
Exception to the Rule of Caveat Emptor	121

CHAPTER VIII.

CONCERNING THE DELIVERY.

It is the Vendor's Duty to Deliver	123
Delivery to Pass Property Between the Parties	124
As to the Place of Delivery	126
As to the Sufficiency of the Delivery	126

CHAPTER IX.

THE BUYER'S DUTIES—ACCEPTANCE, PAYMENT AND TENDER.

What are the Buyer's Duties?	129
Acceptance	130
The Buyer's Duty to Pay or Tender Payment	131

	Page.
Same Subject—Tender	133
Payment By Promissory Note or Bill	134

CHAPTER X.

AVOIDANCE OF CONTRACT.

Mistake and Failure of Consideration	137
Fraud as Avoiding the Contract	139
Same Subject—Fraud on the Vendor	142
Same Subject—Fraud on the Buyer	145
Same Subject—Frauds on Creditors	149

CHAPTER XI.

RIGHTS OF THE VENDOR ON BREACH OF THE CONTRACT.

Personal Actions Against the Buyer, Where the Property Has Not Passed	152
Same Subject—Where the Property Has Passed	153
Vendor's Remedies Against the Goods	153
Same Subject—Lien	156
Same Subject—Resale	158
Same Subject—Stoppage <i>in Transitu</i>	159
When Does a Transit Begin and End?	162
How the Right is Exercised	164
How the Right May Be Defeated	165
The Effect of Stoppage <i>in transitu</i>	165

CHAPTER XII.

RIGHTS AND REMEDIES OF THE BUYER.

Rights and Remedies of the Buyer for Breach of Con- tract	167
Remedies Before Obtaining Possession, Where the Con- tract is Executory	167
Same Subject—Where the Contract is Executed and Title Has Passed	168
Remedies of Buyer After Receiving Possession	169

EQUITY OR CHANCERY JURISPRUDENCE.

CHAPTER I.

THE SUBJECT INTRODUCED AND DEFINED.

	Page.
History of the Court of Chancery	173
Early History of Chancery in the United States	183
Status of Chancery in the United States at Present	183
Equity or Chancery Law Defined	185
Authorities on Equity Jurisprudence or Chancery Law ...	187

CHAPTER II.

PRINCIPLES OF JURISDICTION, MAXIMS AND DOCTRINES OF EQUITY.

Equity Has No Jurisdiction Over Crimes	188
Equity Will Not Assume Jurisdiction Where There Has Always Been a Plain, Adequate Remedy at Law	188
Enlargement of Legal Remedy Does Not Affect Jurisdic- tion in Equity	189
Equity Will Retain Jurisdiction to Give Complete Relief.	189
Equity Will Take Jurisdiction to Prevent a Multiplicity of Suits	190

MAXIMS OF EQUITY.

The Maxims of Equity	191
Pre-Requisite Maxims	193
Descriptive Maxims	198
Substantive Maxims	199

DOCTRINES OF EQUITY.

Equitable Estoppel	204
Election	206
Satisfaction	207
Performance	209
Equitable Conversion	209
Notice	210
Bona Fide Purchasers	212
Penalties and Forfeitures	213

CHAPTER III.

GROUNDS FOR EQUITABLE RELIEF.

	Page.
Accident	214
Same Subject—When Relief Will be Granted	214
Mistake as a Ground for Equitable Relief	217
Same Subject—Mistake of Law	218
Same Subject—Mistake of Fact	220
Fraud as a Ground for Equitable Relief	223
Same Subject—Actual Fraud	225
Same Subject—Constructive Fraud	229
Same Subject—Contracts Made in Violation of Some Statute	230
Same Subject—Contracts Made in Violation of Public Policy	231
Same Subject—Contracts Arising from Abuse of Confiden- tial or Fiduciary Relations	235
Same Subject—Contracts Which Affect Inequitably the Rights of the Parties or Third Persons	239

CHAPTER IV.

PROPERTY IN EQUITY—TRUSTS AND USES.

Origin of Uses and Trusts	243
Classification of Trusts	246
Express Private Trusts—Parties	249
Same Subject—Property Subject to Trust	250
Same Subject—The Trust May be Voluntary, or For Value	250
How Express Trusts are Created	255
Express Public or Charitable Trust	258
Same Subject—How Created and Construed	261
Same Subject—The Doctrine of Cy-Pres	262
Implied or Resulting Trusts to Charities	263
Implied Trusts or Resulting Trusts	264
Same Subject—Residue of Trust Property	267
Same Subject—Disposition of Trust Property on Failure of Heirs, Etc.....	267

	Page.
Constructive Trusts	269
Same Subject—2. Constructive Trust Arising from a Renewal of a Lease by a Trustee, Tenant for Life or Partner	272
Same Subject—3. Constructive Trust Arising from Benefits Bestowed on Property	272
Same Subject—4. For Money Had and Received	273
Same Subject—5. Property Purchased with Trust Funds*	273
Same Subject—Trusts Ex Delicto	274

CHAPTER V.

PROPERTY IN EQUITY—MORTGAGES, LIENS AND ASSESSMENTS.

Real Estate Mortgages	276
Chattel Mortgages	278
Equitable Liens and Mortgages	279
Assignments	280

CHAPTER VI.

EQUITABLE REMEDIES CONSIDERED.

Necessity for Equitable Remedies	282
Accounting	282
Contribution—Exoneration	283
Subrogation—Marshalling	284
Partition—Boundaries	284
Specific Performance	285
Injunction	288
Reformation	292
Cancellation	292
Removing Cloud on Title	293
Ancillary Remedies—Discovery	293
Same Subject—Bills to Perpetuate Testimony	294
Same Subject—Examination of Witnesses De Bene Esse—	295
Same Subject—The Writ of Ne Exeat	295
Same Subject—Interpleader	296
Same Subject—Receivers	296
Same Subject—When a Receiver will be Appointed	297



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